TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 332.

PORT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, APPELLANT,

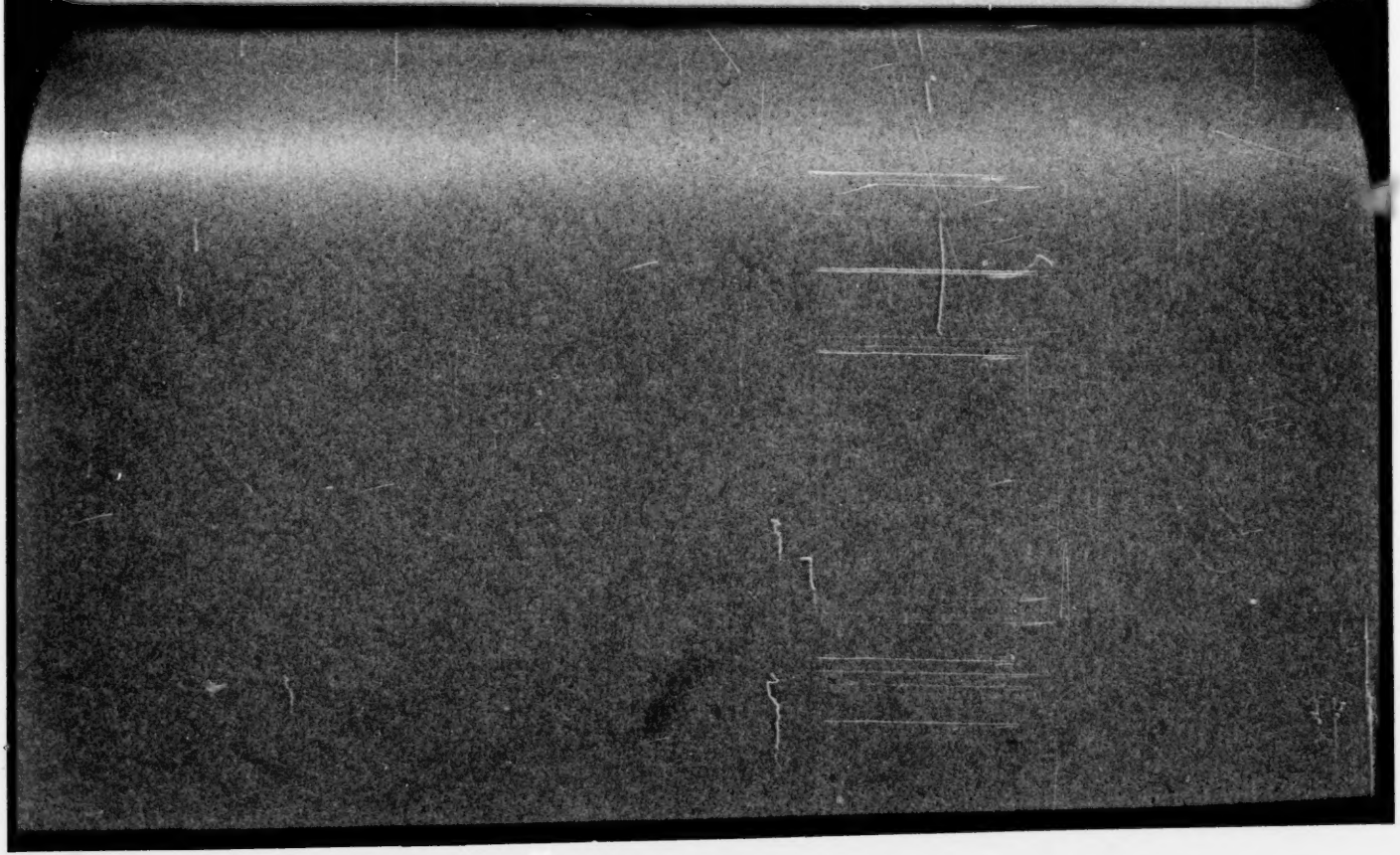
vs.

JOHN W. RYAN AND J. WILLIAM RYAN, SURVIVING PARTNERS OF THE LATE PARTNERSHIP OF ALEX. RYAN, RYAN & CO. ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED JUNE 26, 1900.

(17,213.)



(17,817.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 332.

THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, APPELLANT,

vs.

CHARLES W. RYAN AND J. WILLIAM RYAN, SURVIVING PARTNERS OF THE LATE PARTNERSHIP OF ARBUCKLE, RYAN & CO., ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 United States Circuit Court, Northern District of Ohio, Western Division.

At a stated term of the circuit court of the United States, within and for the western division of the northern district of Ohio, begun and held at the city of Toledo, in said district, on the first Tuesday in December, being the sixth day of said month, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States of America the one hundred and seventeenth—present, the Honorable Augustus J. Ricks, district judge—among the proceedings then and there had were the following, to wit:

Bill of Complaint.

THE ELECTRICAL SUPPLY COMPANY
vs.
THE PUT-IN-BAY WATER-WORKS, LIGHT & Railway Co. *et al.* } No. 1087. Chancery.

Be it remembered that heretofore, to wit, on the ninth day of September, A. D. 1892, a bill of complaint was filed in the clerk's office of said court, and reads and is in words and figures following, to wit:

2 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, a Corporation Organized under the Laws of the State of Connecticut, Complainant,
vs.
THE PUT-IN-BAY WATER-WORKS, LIGHT & RAILWAY COMPANY, a Corporation Organized under the Laws of the State of Ohio; The Railway Equipment Company, a Corporation Organized under the Laws of the State of Illinois; Arbuckle, Ryan & Co., a Partnership in Ohio; James K. Tillotson and The Cleveland Electrical Manufacturing Co., a Corporation Organized under the Laws of the State of Ohio, and The Industrial & Mining Guaranty Company, a Corporation Organized under the Laws of the State of New York, and John P. Carrothers, a Citizen and Resident of the State of New York, and H. H. Warner, a Resident and Citizen of the State of New York, Defendants.

To the judges of said United States circuit court:

The Electrical Supply Company, a corporation duly organized under the laws of the State of Connecticut, and a resident and citizen of said State of Connecticut, bring this their bill of complaint against the Put-in-Bay Water-works, Light & Railway Company, a corporation organized under the laws of the State of Ohio and a resident and citizen of said State — Ohio, with its principal office and place of doing business in Toledo, Lucas county, Ohio. And thereupon your orators complain and say:

3 That on the seventh day of June, 1892, your orators by virtue of a contract that day entered into by and between your orators and said defendant, the said complainant agreed to sell forthwith to said defendant, delivered at Put-in-Bay or South Bass island, Ottawa county, Ohio, certain materials and supplies to be used in the erection of the lighting apparatus, power-house and station and railway of the said defendant, and which said supplies and material were duly delivered to said defendant and used in the erection and construction of said works.

Your orator further says: that a detailed statement of all of said supplies and material, with the date of delivery to said defendant and the price of each of said articles, is hereto attached, marked Exhibit "A," and made a part hereof.

Your orator further says: that all of said supplies and material were used in the construction of the lighting apparatus and railway of said defendant upon the following-described premises, viz: The power-house building situate on lots 471, 472, 473, 474 and 475, in Victory Park addition of Put-in-Bay island, aforesaid, and on and along the poles, ties, track and other structure of the said defendant upon Put-in-Bay or South Bass island, as aforesaid, all of which premises are the property of said defendant.

Your orator further says: that the value of the supplies and material as set forth in said Exhibit "A" is $2,787.04 and that no portion thereof has been paid, but the entire amount is due from the defendant to your orator for material and supplies as aforesaid, with the interest thereon, and defendant refuses to pay for the same.

Your orator further says: that on the seventh day of September, 1892, your orator filed with the recorder of Ottawa county, Ohio, an affidavit containing an itemized statement of the amount and value of the materials and supplies furnished under said contract, with a statement of the account and terms of payment to be made

4 thereunder and a description of the premises upon which said lighting apparatus and railway are located, which said affidavit and all connected therewith was duly recorded by said recorder in a separate book kept for that purpose, to wit, volume two (2), page —, on the — day of September, A. D. 1892, and a true copy of which is hereto attached, marked Exhibit "B" and made part hereof.

And your orator by reason of the premises has a lien on the premises hereinbefore described and all the property of the said defendant from the seventh day of June, 1892, for the amount due from defendant to your orator, with interest as hereinbefore fully set out.

And your orator further says: that in the premises *he* is entirely without remedy according to the strict rules of the common law and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable.

Your orator further says: that the Railway Equipment Company, a corporation organized under the laws of the State of Illinois and a citizen of said State of Illinois; John M. Arbuckle, Charles W. Ryan, and J. William Ryan, copartners in Ohio, and doing business

under the firm name of Arbuckle, Ryan & Company, citizens and residents of the State of Ohio; James K. Tillotson, a citizen and resident of the State of Ohio; the Cleveland Electrical Manufacturing Company, a corporation organized under the laws of the State of Ohio and a citizen and resident of the State of Ohio, and the Industrial & Mining Guaranty Company, a corporation organized under the laws of the State of New York and a citizen and resident of the State of New York, and John P. Carrothers, a citizen and resident of the city and State of New York, and H. H. Warner, a resident and a citizen of the State of New York, claim to have some interest in the premises upon which your orator claims to have
5 a lien as aforesaid. And your orator prays that each of said parties may be required to appear in this court and set up any claim or interest he may have in said premises or be forever barred from setting up the same as against your orator.

And your orator further prays judgment directing that the defendant come to a fair and just account with your orator in the premises and fully perform its contract with your orator as before set out, and that the amount due from the defendant to you- orator under said contract be found and determined, and directing that your orator have a lien for the sum so found due from defendant to your orator upon the premises hereinbefore described, and further directing a sale of said premises, and from the proceeds of said sale the costs of this proceeding be first paid, and from the residue there be paid the amount then found due and payable to your orator by reason of the premises. And your orator prays for such further judgment as equity and good conscience may require. And may it please your honors to grant unto your orator the writ of subpœna of the United States of America to be directed to the said defendant and also to the several parties claiming an interest in said premises, as aforesaid, thereby commanding each and all of them on a certain day personally to be and appear before your honors in this honorable court, then and there — abide such order and decree therein as shall seem agreeable to equity and good conscience, and your orators shall ever pray.

L. G. RICHARDSON,
Solicitor for Plaintiff.

STATE OF OHIO, }
Lucas County, } *ss:*

UNITED STATES OF AMERICA, }
Northern District of Ohio, Western Division, } *ss:*

On the eighth day of September, 1892, personally appeared
6 before me, the undersigned, Louis G. Richardson, who, being by me duly sworn, says that he is solicitor and agent for The Electrical Supply Company, complainant in the foregoing action, duly authorized; that said complainant is a corporation; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are herein stated to be on information and belief, and that as to these matters he believes it to be true.

LOUIS G. RICHARDSON.

Sworn to and subscribed before me this eighth day of September, 1892.

ALMON HALL,
United States Commissioner, Northern District of Ohio.

7 *Subpœna.*

Afterwards on the same day a subpœna was issued in this cause, from the clerk's office of said court, and reads and is in words and figures following, to wit:

THE UNITED STATES OF AMERICA,)
Northern District of Ohio, Western Division,) *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon the Put-in-Bay Water-works, Light & Railway Company; the Railway Equipment Company; Arbuckle, Ryan & Company; James K. Tillotson; the Cleveland Electrical Manufacturing Company; the Industrial & Mining Guaranty Company; John P. Carrothers and H. H. Warner, if they be found in your district, to be and appear in the circuit court of the United States, in and for the division and district aforesaid, at Toledo, on the first Monday in November next, to answer certain bill in chancery filed and exhibited in said court against them by the Electrical Supply Company.

Hereof they shall not fail under the penalty of the law, thence ensuing, and have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this ninth day of September, A. D. 1892, and in the one hundred and seventeenth year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk,*
By FORD BELFORD,
Deputy Clerk.

Memorandum.

The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, in Toledo, on or before the first Monday of October, 1892, otherwise the said bill may be taken *pro confesso.*

IRVIN BELFORD, *Clerk.*

8 *Marshal's Return on Subpœna.*

Said subpœna was returned to the clerk's office of said court, on September 16th, 1892, endorsed thereon as follows, to wit:

NORTHERN DISTRICT OF OHIO, *ss:*

On the tenth day of September, 1892, at Toledo, Ohio, I made due service of this writ on the within named, The Put-in-Bay Water-works,

Light & Railway Company, by delivering a true and duly certified copy thereof to John P. Carrothers, its president, and by delivering a like copy to —— Ryan, of the within-named firm of Arbuckle, Ryan & Company, and by delivering a like copy to each of the within-named, James K. Tillotson and John P. Carrother, and on the fourteenth day of September, 1892, at Cleveland, Ohio, I made further service of this writ on the within-named, The Cleveland Electrical Manufacturing Company, by delivering a like copy to M. M. Hobart, its president.

The Railway Equipment Company, the Industrial & Mining Guaranty Company and H. H. Warner not found within my district, neither have they or either of them a residence therein.

W. C. HASKELL,
U. S. Marshal,

By C. J. PEET,
DANIEL HARMON, AND
J. S. EBERMAN, *Deputies*.

Service, 5	$10.00
Copies, 8	4.00
Travel, 115 miles	6.90
	$20.90

Answer and Cross-bill of J. K. Tillotson.

On September 10, 1892, an answer and cross-bill was filed
9 herein, by the defendant, J. K. Tillotson, and which said answer and cross-bill reads, and is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRIC SUPPLY COMPANY, a Corporation under the Laws of Connecticut, Complainant, *vs.* THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY COMPANY *et al.*, Defendants.	Answer and Cross-bill of the Defendant J. K. Tillotson.

And now comes the defendant, J. K. Tillotson, and by way of answer to the plaintiff's bill of complaint, and also by way of cross-complaint against the plaintiff, and the other defendants, says:

That on or about the first day of April, 1891, he undertook to build a water works, lighting apparatus and electric railway on South Bass island, Ottawa county, Ohio; and in furtherance of said scheme, on the twenty-third day of April, 1891, he procured from the State of Ohio, a certificate of incorporation by which the defendant, "The Put-in-Bay Water-works, Light & Railway Company," was duly incorporated, and authorized to construct and operate water works, lighting apparatus and electric railway on said South Bass

island, and said corporation had an authorized capital stock of $150,000, in shares of ($100) one hundred dollars each, and this defendant says that all of said capital stock was retained by said corporation as owner, except five (5) shares, gratuitously distributed among a sufficient number of persons to organize said corporation, and composed a board of directors, and fill the offices required by the laws of the State of Ohio, and (150) one hundred and fifty shares subscribed for by this defendant, and that he and said corporation were in effect one person and identical.

10 And this defendant, in order to procure the means to construct said water works, light works and railway, had said corporation issue one hundred and twenty-five (125) bonds of one thousand (1,000.00) dollars each, bearing date the sixteenth day of June, 1892, and payable on or before the first day of July, 1912, and bearing interest at the rate of six per cent. per annum, payable on the first day of January and July of each year, as evidenced by the coupons on said bonds attached, all of which bonds this defendant had said corporation secure, by the execution of a first mortgage upon all the property of said corporation, real and personal, on South Bass island, Ottawa county, Ohio, which said mortgage was duly executed in favor of the defendant, The Atlantic Trust Company, trustee, and on the sixteenth day of June, 1892, left for record with the recorder of deeds of Ottawa county, Ohio, at his office in Port Clinton, Ohio, and by him duly recorded on the sixteenth day of June, 1892, in the mortgage records of said county, vol. —, page —.

This defendant further answering says: that on the first day of July, 1891, he entered into a contract with said corporation to convey to it the right of way, and property necessary for the construction of its railway, and to construct thereon a single-track electric railway, and also to construct on land to be provided for that purpose a power-house, and all other structures and machinery necessary for the completion and operation of the water works, electric-light works, and railway to be built by said corporation as aforesaid, and for the said conveyance, and the construction of said works as aforesaid, the said corporation was to pay to him 1,345 shares of the capital stock, fully paid up, of said company, being all of the capital stock of said corporation, except the 130 shares before subscribed for by this defendant, and the five (5) shares distributed to complete the organization of the corporation as aforesaid.

11 Said corporation was also to give to this defendant a receipt in full for the subscription made by him, for the 150 shares of capital stock as aforesaid, and also for the subscription for the five (5) shares for distribution as aforesaid.

And said corporation was also to pay to this defendant, under said contract, one hundred and twenty-five thousand dollars ($125,000) of the first-mortgage bonds of the said corporation, a full description of said bonds and mortgage having been hereinbefore fully set out by this defendant.

And it was further provided in said contract, that if it should be necessary or convenient for this defendant to use said bonds and

ock, in whole or in part, in the construction of said plants, or in is contracts therefor, the same should be delivered to this defendant, s he might need or call for them, in whole or in part; a copy of hich contract is hereto attached, marked "A" and made part ereof.

And this defendant, not having sufficient means without the use f said bonds and stock, to complete the work assumed by him in aid contract, took possession of said bonds and stock under said ontract, for the purpose of using the same to raise the necessary unds to complete said work, either by the sale of said bonds and tock or a portion of them, or by using the same as collateral upon emporary loans, and this defendant is now the owner of said bonds nd stock.

And this defendant thereupon made effort to raise money as aforesaid, upon said securities, to carry on said work, and while so doing was approached by the defendant, John P. Carrothers, who represented to this defendant that he was an intimate friend and business associate of H. H. Warner, who was a wealthy capitalist of New York city, and that he and said Warner had organized and incorporated in the State of New York a company under the name of "Industrial & Mining Guaranty Company," and that said company was organized for the purpose of negotiating and dealing in
12 such securities as this defendant was then seeking to sell, negotiate, or raise money upon.

And thereupon this defendant explained to said defendant, Carrothers, the nature of the bonds and stock he had to dispose of, together with a full explanation of the manner of their issue and the circumstances attending the same, also explained the nature of his ownership and possession of the same, and said defendant, Carrothers, thereupon examined said securities in possession of this defendant as aforesaid, and expressed himself as satisfied therewith, and represented to this defendant that he could, without difficulty or delay, negotiate all said securities in New York city through his friend, the defendant, H. H. Warner, and the corporation organized by them as aforesaid.

And this defendant, relying upon the representations of said defendant, Carrothers, and his assurances of a speedy negotiation of said securities, and his promise to furnish to defendant from time to time, as needed, money and credit out of said securities, to enable this defendant to carry out the construction of said works as aforesaid, on the twenty-fifth day of June, 1892, entered into a contract with the said defendant, Carrothers, under and in the name of "Industrial & Mining Guaranty Company," which contract was in writing, and signed on the part of said Carrothers and said defendant, H. H. Warner, as follows: "Industrial & Mining Guaranty Company, by H. H. Warner, president," and by this defendant personally, and at the special request of the said defendant, Carrothers, and Warner, also signed by this defendant as follows: "The Put-in-Bay Water-works, Light & Railway Co., by J. K. Tillotson, vice-president."

But this defendant avers that at the time of the execution of said

contract, the defendants, Carrothers and Warner, well knew
13 that this defendant was the sole owner of the capital stock of said railway company, and of the first-mortgage bonds of the same, and also well knew the circumstances attending the issue of the same, and the nature of this defendant's ownership thereof.

And this defendant says, that by the terms of said contract, said defendants, Carrothers and Warner, and the Industrial & Mining Guaranty Company (if any such company exists) contracted and agreed with this defendant to negotiate and sell $125,000 of the first-mortgage bonds of said railway company, as hereinbefore described, and also contracted and agreed to pay a certain claim of "the Central Thomson-Houston Company," amounting to the sum of $23,500, and to advance to defendant the sum of $15,000, payable in three (3) sight drafts of five (5), ten (10) and fifteen (15) days, respectively, after the twenty-seventh day of June, 1892, and also agreed to pay to this defendant the following sums, namely, $10,000, on the twentieth day of July, 1892, and the same amount every fifteen (15) days thereafter, until the total amount paid to this defendant, inclusive of the payment of the claim of the Central Thomson-Houston Company of $23,500, and the aforementioned advancement of $15,000, should amount to the gross sum of $118,750.

And by said contract, this defendant agreed to deposit with said defendants, Carrothers and Warner, one hundred thousand ($100,000) dollars of the capital stock of said railway corporation, in consideration whereof the foregoing payments were to be made, and when said payments were all made, then it was provided by said contract that said one hundred thousand ($100,000) dollars of the capital stock of said railway company should become the absolute property of the said Carrothers, Warner, and said guaranty company.

And this defendant says that he has fully complied with all
14 the obligations assumed by him in said contract, and has deposited with said defendants, Carrothers and Warner, $125,000 of the bonds of said railway company, and also, $100,000 of its capital stock.

And this defendant further avers that said defendants, Carrothers and Warner, and said guaranty company, wholly failed to carry out the obligations assumed by them in said written contract; that they have not negotiated or sold any of the said bonds for this defendant, nor have they accounted to him in any manner for the same.

Neither have said defendants paid to this defendant any of the sums of money which they agreed to pay in said contract, except the said sum of $15,000, provided for by three (3) sight drafts as aforesaid, yet said defendants retain possession of all of said bonds and stock as aforesaid, and refuse to account to this defendant for the same or in any manner pay for the same or return it to this defendant, as often requested by this defendant to do. And this defendant is ready and willing now and at all times, upon the return of said stock and bonds, to give back to said defendants the $15,000 advanced as aforesaid, and hereby makes tender of the same, and said written contract is hereto attached and made part hereof and marked Exhibit "B."

And this defendant avers that by reason of the premises the said defendants have no right or interest in any of said bonds or stock, and no right to the possession of the same, and that said contract has become null and void, by reason of the default of said defendants, as aforesaid.

And this defendant is the only true owner of said securities and is entitled to the possession of the same.

And this defendant alleges upon information and belief that said defendant, Carrothers, is a man of no property and without financial responsibility.

And this defendant further avers, also upon information and belief, that said defendants, Carrothers and Warner, or one of them, will sell, negotiate, or in some manner make way with said bonds and stock, and use the proceeds for their own purposes, and will refuse to account to this defendant as in said contract provided.

15

And this defendant further avers that under said contract he fully constructed and equipped said railroad from a point near the Beebe house to the Hotel Victory, in said South Bass island, a distance of about one and one-third miles, and said portion of said railway has been in successful operation for the past two (2) months or more, and has been earning daily large sums of money and said defendant, Carrothers, under the claim that he is the owner of said $100,000 of the capital stock of said railway company, elected himself president of said company, and has taken possession of said railway and its daily earnings, and refuses to account to this defendant for the same in any manner, and denies that this defendant has any interest in said premises.

And this defendant avers that said railway has not yet been fully completed, as provided by said contract marked Exhibit "A," but this defendant avers that his failure to thus complete said railway, has been caused wholly by the fa-lure of said defendants, Carrothers, Warner and guaranty company, to negotiate and sell said first-mortgage bonds for this defendant, or to return the same to this defendant, so that he himself can negotiate said sale, and because of the failure of said defendants to make any of the payments for said capital stock (except said $15,000), as agreed upon in said contract Exhibit "B," and this defendant is now ready and willing to complete said railway according to the terms of said contract, Exhibit "A," as soon as said defendants, Carrothers, Warner and guaranty company comply with their obligations, under contract, Exhibit "B," and negotiate and sell said bonds, and make the several payments for capital stock therein assumed by them, and this defendant here makes tender of said performance of such of the work which he agreed to do in contract, Exhibit "A," as is yet undone, upon the compliance by said defendants of their obligations, as aforesaid, or a surrender of said stock and bonds to this defendant.

16

And plaintiff avers that all the work he agreed to perform in said contract, Exhibit "A," has been fully performed, except such portion

as aforesaid, and has been delayed by the default of said defendants as aforesaid.

And this defendant avers that by reason of the premises, the said default of said defendants, Carrothers, Warner and guaranty company, is a continuing damage to this defendant, and is daily causing him irreparable injury, and will so continue, unless said defendants are restrained by the order of this court.

Wherefore, this defendant prays that a restraining order issue from this court, directed to said defendants, John P. Carrothers, H. H. Warner and the Industrial & Mining Guaranty Company, forbidding each and all during the pendency of this suit, from negotiating, selling or otherwise disposing of any or all of the bonds or stock hereinbefore fully described, and also restraining them from transferring any of said stock upon the books of said railway company, and that a writ of subpœna may issue out of this court commanding said defendants to appear in this court and show cause why said bonds and stock should not at once be returned to this defendant, and this defendant further prays, that on a final hearing of this cause, said restraining order be made perpetual, and said defendants be forever enjoined from negotiating, selling or otherwise disposing of any or all of said capital stock and bonds, hereinbefore fully described.

And this defendant further prays that this court will appoint a receiver to take the charge and custody of the railway and property in plaintiff's bill of complaint described, which this defendant
17 avers is the railway and property constructed by him under contract, Exhibit "A," with instructions to care for and operate the same under the order of this court, and, as in the judgment of the court, may be for the interest of all parties concerned.

And this defendant further prays that if, in the further hearing of this cause, it is found that the plaintiff has a lien upon the property in his bill of complaint described, and an order of sale is issued for the satisfaction of said lien, then, and in that case, in said order of sale, the rights of this defendant in said first-mortgage bonds and other property of said railway company, as may be found and determined by this court in this cause, may be fully protected, and for all other proper relief as shall seem agreeable to equity and good conscience. And your orators will ever pray.

DOYLE, SCOTT & LEWIS,
Solicitors for J. K. Tillotson, Defendant.

STATE OF OHIO, }
Lucas County, } ss:

Personally appeared before me the undersigned authority, J. K. Tillotson, the foregoing defendant, and made oath that the facts stated in the foregoing answer and cross-bill of complainant, as far as they purport to be stated, of his own knowledge, are true, and so far as they purport to be stated on information and belief, he believes it to be true.

JAMES K. TILLOTSON.

Sworn to before me and subscribed in my presence this — day of September, A. D. 1892.

[SEAL.] FREDERICK B. WILLARD,
Notary Public, Lucas County, Ohio.

Temporary Restraining Order.

Endorsed on said cross-bill of J. K. Tillotson was the following order, to wit:

Let a temporary restraining order issue against John P. Carrothers and H. H. Warner as prayed for in this bill upon complainant entering into bond conditioned as required by law in sum of $10,000, this tenth day of September, 1892.

AUGUSTUS J. RICKS,
United States District Judge.

18 *Order Appointing Receiver.*

Afterwards, on September 10, 1892, an order was made herein, and entered on the chancery order book of said court, and reads and is as follows, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *vs.* THE PUT-IN-BAY WATER-WORKS, LIGHT & Railway Company *et al.*, Defendants. } Order Appointing Receiver.

And now comes this cause on to be heard before A. J. Ricks, one of the judges of this court, in chambers at Cleveland, Ohio, on the motion for the appointment of a receiver as embodied in the answer and cross-bill of the defendant, J. K. Tillotson, on consideration whereof it is found, that this is a proper case for the appointment of a receiver, and it is therefore ordered that L. S. Baumgardner be and is hereby appointed receiver in this action, on his giving an undertaking to Irvin Belford, the clerk of this court, in the sum of $5,000.00, conditioned that the said L. S. Baumgardner shall faithfully discharge his duties of such receiver in this action, and obey the orders of the court herein; and thereupon came the said L. S. Baumgardner and entered into an undertaking as aforesaid with A. W. Scott as his sure*ties*, to the acceptance of the court, and thereupon the said L. S. Baumgardner was duly sworn faithfully to perform his duties as such receiver; and it is further ordered that the said L. S. Baumgardner do proceed forthwith to take possession of such property, as such receiver, and safely keep the same under the orders of this court, in this action to be made. And the said several defendants herein, and all other persons having any of said property in their possession are hereby required and commanded to de-

liver the same to the said L. S. Baumgardner as such receiver,
19 on his demand, under the penalty of law for contempt in refusing so to deliver the same.

Done this tenth day of September, A. D. 1892, at Cleveland in said district.

AUGUSTUS J. RICKS,
United States District Judge, &c.

Receiver's Bond.

Afterwards, on September 10, 1892, a receiver's bond was filed herein, and reads and is in words and figures following, to wit:

Know all men by these presents, that we, L. S. Baumgardner, as principal, and A. W. Scott, as surety, both of the city of Toledo, Ohio, are held and firmly bound unto Irvin Belford, clerk of the circuit court of the United States for the northern district of Ohio, in the sum of five thousand dollars ($5,000), good and lawful money of the United States, to be paid to the said Irvin Belford, clerk as aforesaid, his successors and assigns, for the use and benefit of the parties hereinafter named, for which payment well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, and every of them, firmly by these presents.

Sealed with our seals and dated at Toledo, O., this tenth day of September, 1892.

The condition of this obligation is such that, whereas, on this tenth day of September, A. D. 1892, by an order of the circuit court of the United States, for the northern district of Ohio, in an action therein pending, wherein The Electrical Supply Company is complainant, and The Put-in-Bay Water-works, Light & Railway Company *et al. as* defendants, on the motion of J. K. Tillotson, as embodied in the answer and cross-bill of the said J. K. Tillotson in said cause, the above-named L. S. Baumgardner was duly ap-
20 pointed a receiver of the property and franchises of said Put-in-Bay Water-works, Light & Railway Company, a corporation organized under the laws of the State of Ohio;

And whereas, under said order of said court, the said L. S. Baumgardner was required to execute a bond to the clerk of said circuit court in the sum of five thousand dollars ($5,000), for the use and benefit of the several parties to said suit, and all others who might be interested in the faithful performance and discharge by said Baumgardner of his duties as such receiver.

Now, therefore, if the said L. S. Baumgardner shall faithfully perform and discharge his said duties as such receiver, and faithfully and fully carry out and perform all the orders and directions of said court to him as such receiver, then this obligation to be void; otherwise to remain in full force and virtue in law.

L. S. BAUMGARDNER, *Principal.*
A. W. SCOTT, *Surety.*

Acknowledged before me and accepted and approved September 10th, A. D. 1892.

AUGUSTUS J. RICKS,
Judge U. S. District Court, N. D. O.

Endorsed on said bond was the following, to wit: Filed September 10, 1892. Irvin Belford, clerk.

Subpœna on Cross-bill of J. K. Tillotson.

Afterwards, on the tenth day of September, A. D. 1892, a subpœna on the cross-bill of J. K. Tillotson was issued from the clerk's office of said court, and reads and is in words and figures following, to wit:

THE UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Western Division, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon John P. Carrothers, H. H. Warner, and the Industrial & Mining Guaranty Company, if
21 they be found in your district, to be and appear in the circuit court of the United States in and for the division and district aforesaid, at Toledo, on the first Monday in November next, to answer a certain cross-bill in chancery, filed and exhibited in said court against them by J. K. Tillotson.

Hereof they are not to fail under the penalty of the law, thence ensuing, and have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this tenth day of September, A. D. 1892, and in the one hundred and seventeenth year of the Independence of the United States of America.

[SEAL.]

IRVIN BELFORD, *Clerk*,
By FORD BELFORD,
Deputy Clerk.

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court, in Toledo, on or before the first Monday of October, 1892, otherwise the said bill may be taken *pro confesso*.

IRVIN BELFORD, *Clerk.*

Marshal's Return on Subpœna.

Afterwards, on September 16, 1892, said subpœna was returned to said clerk's office, with the following marshal's return endorsed thereon, to wit:

NORTHERN DISTRICT OF OHIO, *ss:*

On the tenth day of September, 1892, at Toledo, Ohio, I made due service of this writ by delivering a true and duly certified copy thereof to the within-named John P. Carrothers.

The within-named H. H. Warner and the Industrial Mining & Guaranty Company not found within my district, neither have they or either of them a residence therein.

W. C. HASKELL,
United States Marshal.
By C. J. PEET, *Deputy.*

22	Service	$2.00
	Copies	1.50
		$3.50

Injunction Bond.

Afterwards, on September 10, 1892, an injunction bond was filed herein, and reads and is in words and figures following to wit:

Know all men by these presents that we, J. K. Tillotson, George H. Ketcham and Louis G. Richardson, are held and firmly bound unto the Industrial & Mining Guaranty Company, H. H. Warner and John P. Carrothers, in the sum of ten thousand dollars ($10,000.00), to the payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this tenth day of September, A. D. 1892.

The condition of the above obligation is such that, whereas the said J. K. Tillotson, a citizen of the State of Ohio, has filed in the circuit court of the United States, for the northern district of Ohio, a cross-bill in chancery against the said Industrial & Mining Guaranty Company, H. H. Warner and John P. Carrothers in an action pending in said court, wherein The Electrical Supply Company is complainant, and The Put-in-Bay Water-works, Light & Railway Company *et al.* are defendants, and has obtained an allowance of an injunction, as prayed for in said bill, from the said United States circuit court for the northern district of Ohio:

Now, if the said J. K. Tillotson shall abide the decision of said court in said cause, and pay all moneys and costs which shall
23 be adjudged against him in case the said injunction shall be dissolved, then these presents shall be void, otherwise to remain in full force.

J. K. TILLOTSON. [SEAL.]
GEORGE H. KETCHAM. [SEAL.]
LOUIS G. RICHARDSON. [SEAL.]

Endorsed on said bond was the following approval, to wit: Approved September 10, 1892. Irvin Belford, clerk United States circuit court, northern district of Ohio.

Also endorsed on said bond was the following, to wit: Approved and filed September 10, 1892. Irvin Belford, clerk.

Injunction.

Afterwards, on September 10, 1892, an injunction was issued from the clerk's office of said court, and reads and is in words and figures following, to wit:

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Western Division,* } ss:

The President of the United States of America to Industrial & Mining Guaranty Company, H. H. Warner, John P. Carrothers, Greeting:

Whereas, J. K. Tillotson, citizen of the State of Ohio, has filed on the chancery side of the circuit court of the United States within and for the northern district of Ohio, a cross-bill against said Industrial & Mining Guaranty Company, H. H. Warner and John P. Carrothers, in a cause therein pending, wherein The Electrical Supply Company is complainant and The Put-in-Bay Water-works, Light & Railway Co. *et al.*, are defendants, and has obtained an allowance of an injunction, as prayed for in said bill, from the Honorable Augustus J. Ricks, United States district judge, a judge of said court.

24 Now, therefore, we having regard to the matters in said cross-bill contained, do hereby command and strictly enjoin you, the said Industrial & Mining Guaranty Company, H. H. Warner and John P. Carrothers, and each of you, during the pendency of said suit, from selling, negotiating or otherwise disposing of any or all of the bonds or stock of the said Put-in-Bay Water-works, Light & Railway Company now in your possession or under your control, and received under and by virtue of an agreement made and entered into on the twenty-fifth day of June, 1892, between the said Put-in-Bay Water-works, Light & Railway Company and the Industrial & Mining Guaranty Company from J. K. Tillotson.

Which commands and injunction you are respectfully required to observe and obey until our said circuit court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this tenth day of September, A. D. 1892, and in the one hundred and seventeenth year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk.*

Return on Injunction.

On September 16, 1892, said writ of injunction was returned to the said clerk's office and filed, having thereon the following marshal's return, to wit:

NORTHERN DISTRICT OF OHIO, *ss:*

On the tenth day of September, 1892, at Toledo, Ohio, I made due service of this writ by delivering a true and duly certified copy thereof to the within-named John P. Carrothers.

The within-named Industrial Mining & Guaranty Company and H. H. Warner not found within my district; neither have they or either of them a residence therein.

W. C. HASKELL,
U. S. Marshal,
By C. J. PEET, *Deputy.*

Service $2 00
Copy 50

Answer of the Put-in-Bay Water-works, Light & Railway Company.

Afterwards, on September 26, 1892, an answer to the bill of complaint was filed herein by defendant, The Put-in-Bay Water-works, Light & Railway Company, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, a Corporation Organized under the Laws of the State of Connecticut, Complainant,
vs.
THE PUT-IN-BAY WATER-WORKS, LIGHT and Railway Company *et al.*, Defendants.

Answer of the Defendant The Put-in-Bay Water-works, Light and Railway Company.

The said defendant, The Put-in-Bay Water-works, Light & Railway Company, for answer to the complainant's bill says, it admits that on or about the seventh day of June, 1892, the complainant entered into a contract with this answering defendant, through its vice-president, the defendant, J. K. Tillotson, agreeing to sell and deliver certain materials to be used by this answering defendant in the construction of its railway on South Bass island, Ottawa county, Ohio. This defendant says that it is not true that Exhibit "A," attached to the complainant's bill, contains a true and correct statement of the materials so sold by the complainant to this defendant as aforesaid. And it is not true that all of said supplies and material contained in said Exhibit "A" were used in the construction of the said railway. But, on the contrary, this defendant says that a large part of said materials were sold and delivered to said defendant, J. K. Tillotson, for the purpose of being used, and which were used, in the construction of certain property known as Hotel Victory on South Bass island. This defendant says that it is not true
27 that the materials sold to this defendant by said complainant as aforesaid were of the value of $2,787.04, as set forth in

said Exhibit "A;" but, on the contrary, this defendant is informed and believes, and so states the fact to be that the material so sold by said complainant to this defendant, through its vice-president, the defendant, Tillotson, for the purpose of being used in the construction of said railway, and which were so used, amounted in value to about the sum of $700, and no more.

This defendant had no knowledge of the complainant's said claim against it, and said complainant never before the commencement of this action made demand on said company for the payment of its alleged claim.

This defendant further says that the said complainant, when it sold the said Tillotson the material set forth in Exhibit "A" of said complaint, well knew that a large part of said material was so sold and delivered for the purpose of being used, and *were* used in the construction of Hotel Victory, of which the said Tillotson was president, and which had no connection whatever with this defendant's railroad. And this defendant alleges that said complainant, at the request of said Tillotson, procured a lien to be filed with the recorder of Ottawa county against this defendant's property, on the day previous to the filing of the complainant's complaint herein, and for the entire amount of the material sold to this defendant, and also sold to said Tillotson, for the use of said Hotel Victory. And said lien was so filed by said complainant at the request of said Tillotson, for said amount, and for the express purpose of instituting this action in this court.

And this defendant prays that this honorable court may take an account of material sold by complainant to and for the use of the defendant, to be used in the construction of said railway, and the amount of said material so sold, which has actually been
28 used in the construction thereof. And that the court may further determine the value of said material so sold to and used by this defendant, and the actual amount of the lien which said complainant has on account thereof against the property of this defendant. And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said complainant charged, without this, that there is any other matter, cause or thing in the said complainant's bill contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied, is not true, to the knowledge and belief of this defendant. All of which matters and things this defendant is willing to aver, maintain and prove, as this honorable court shall direct.

THE PUT-IN-BAY WATER-WORKS, LIGHT & RAILWAY COMPANY.
E. W. TOLERTON, *Solicitor.*

STATE OF OHIO, }
Lucas County, } *ss:*

Northern District of Ohio, Western Division.

John P. Carrothers, president of the Put-in-Bay Water-works, Light & Railway Company, being duly sworn, says that the allegations contained in the foregoing answer are true.

JNO. P. CARROTHERS.

Sworn to before me and subscribed in my presence this twenty-fourth day of September, 1892.

CHAS. W. BOND,
[SEAL.] *Notary Public.*

Answer of John P. Carrothers.

Afterwards, on September 26, 1892, the answer of John P. 29 Carrothers to the answer and cross-bill of J. K. Tillotson was filed herein, and reads and is in words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER-WORKS, LIGHT & Railway Company *et al.*, Defendants.
} Answer of John P. Carrothers.

The answer of the above-named defendant, John P. Carrothers, to the answer and cross-bill of the defendant J. K. Tillotson.

In answer to said cross-bill, I, John P. Carrothers, say as follows:

1. The said defendant, Tillotson, some time in the month of June, 1892, spoke to me about the sale of the said bonds of the Put-in-Bay Water-works, Light & Railway Company. I was then residing in the city of New York, and was acquainted with parties whose business it was to deal in securities of that kind, and I stated to said Tillotson, that I would endeavor to negotiate and sell said securities. The said Tillotson represented to me that said bonds belonged to said Put-in-Bay Water-works, Light & Railway Company. That he was vice-president and general manager thereof, and that he desired to negotiate and sell said bonds for and on behalf of said company. It is not true that said Tillotson, at that time or at any other time, represented to me that he was the owner of said bonds, and that said company had no interest therein. It is true that said Tillotson at said time represented to me that said railway would be completed by July 29, 1892, and ready for operation. That the title of the company to its property was perfect, and that there was and would be no incumbrances or liens of any kind against the said property on account of the construction thereof.

30 2. And thereupon, and relying upon the truth of the representations made by said Tillotson, as aforesaid, I went to New York and recommended the purchase of said securities to the said Industrial & Mining Guaranty Company, a corporation organized under the laws of New Jersey, and for the purpose of dealing in that class of securities. Subsequently, and on the twenty-fifth day of June, 1892, the said Tillotson came to New York city for the express purpose of persuading said company to purchase said bonds; he came to the office of said company, 41 Broadway, New York city, and was introduced by me to Mr. H. H. Warner, president of said Industrial & Mining Guaranty Company. For the purpose of inducing the said company to purchase said bonds, the said Tillotson then and there represented to Mr. Warner, the president thereof, in my presence, that said railway was complete, except as to cars and equipment, and would be fully completed in all respects on or before the twenty-ninth day of said June. Said Tillotson submitted to said Warner a map of South Bass island, showing the line of said railroad as extending from the steamship docks of said island, passing through the property of the Hotel Victory Company; thence to the shore of the lake, on the northwest corner of said island; and thence to the said docks, forming a belt extending a distance of about four miles. Said Tillotson then and there represented that the title to the said railway property and right of way was vested in said company, and was clear and free of all incumbrances. And I, relying upon the truth of the representations so made by said Tillotson, recommended to said guaranty company the purchase of said bonds.

3. I was not then and am not now interested in said guaranty company, except as the holder of certain shares of stock therein.

4. And thereupon, and at that time, the contract attached

31 to said answer and cross-bill, marked Exhibit "A," was executed, the said bonds were delivered to said guaranty company by the said Tillotson, as its vice-president. The said Tillotson represented at that time that he had possession of the one hundred thousand dollars capital stock of said company mentioned in said contract, that it was issued in his name for the purpose of being used and delivered in a sale of the bonds. And thereupon, for the purpose of passing the title to said stock, the said Tillotson signed the said contract individually, as well as in the name of said Put-in-Bay Water-works, Light & Railway Company. I deny that said contract was signed or executed in any manner by me except as witness. I deny that I had any other or further information in relation to the issuing of said stock and bonds, except the representations of said Tillotson aforesaid.

5. Shortly after the execution of said contract I came to Toledo and South Bass island for the purpose of looking after said property for said guaranty company, and at that time I first learned of the existence of the contract attached to said answer and cross-bill, and marked Exhibit "A." During the time the said Tillotson was negotiating the sale of the said bonds and stock, he made no mention whatever to me or in my presence of the existence of said con-

tract referred — as Exhibit "A." And I further learned at the same time that said Tillotson claimed to have the title to the right of way of said railway in himself individually, and also claimed the right under said construction contract, to hold possession of said railway property individually, and then and there represented to me that inasmuch as said construction contract contained no provision as to time when he should complete said railroad, he had the right to keep possession of the same as long as he desired and have the proceeds of the operation thereof. And thereupon, and as soon as I learned the facts aforesaid, I returned to New York and advised the guaranty company of the same.

32 6. On the twenty-fifth day of July, 1892, at a meeting of the stockholders of said Put-in-Bay Water-works, Light & Railway Company, at its office, No. 312 Summit street, Toledo, O., at which all the stockholders of company were present, including the said defendant, Tillotson, I was elected president of said railway company by the unanimous vote of all the stockholders. Soon thereafter, as the president of said company and not otherwise, I requested said Tillotson to deliver to me the possession of said railroad, and also all the papers, contracts and personal property belonging thereto. Said Tillotson declined to deliver the possession of said property, but on the contrary, retained forcible possession thereof, until the third day of September, 1892, when the said railway company, through me as its president, obtained possession and control of said railway by virtue of a writ of replevin, excepting the books, right of way contracts, paper and evidences of title belonging to said company which the said defendant, Tillotson, secreted, and then refused and now refuses to deliver the same to the said company. That said railway began operations on or about the first day of July, 1892, and from that time to the said third day of September the operations of said road were very successful, and it daily earned large sums of money which the said defendant, Tillotson, appropriated to his own use and to the use of said Hotel Victory, and refused and still refuses to deliver the same to the said railway company. From the third day of September, 1892, until the appointment of a receiver in this action I had possession of said railway as its president and not otherwise. During the said time the said railway company earned no more than sufficient to pay its operating expenses, and all the proceeds thereof *was* devoted by me to that purpose.

7. I further say, that as president of said company, I am desirous of completing the said road at once, and am also desirous of
33 paying and discharging all liens and obligations existing against the property of said company, and it is necessary that the balance of the proceeds of the sale of said bonds now in the hands of the said Industrial & Mining Guaranty Company should be devoted to that purpose, and I claim that said railway company is entitled to have and receive from said guaranty company the proceeds of the sale of its said bonds & the guaranty company, the purchaser thereof, is entitled, under its agreement of purchase, to have the said money applied towards the completion of the said road and the perfecting of its title.

8. And I deny all and all manner of unlawful combination and confederacy wherewith I am by said answer and cross-bill charged, without this, that there is any other matter, cause or thing in said complainant's bill contained material or necessary for me to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied, to my knowledge and belief, all of which matters and things I am willing to aver, maintain and prove as this honorable court may direct.

JOHN P. CARROTHERS.
E. W. TOLERTON, *Solicitor.*

STATE OF OHIO, *Lucas County,* } ss:

Northern District of Ohio, Western Division.

John P. Carrothers being duly sworn says, that the allegations contained in the foregoing answer are true.

JNO. P. CARROTHERS.

Sworn to before me and subscribed in my presence this twenty-fourth day of September, 1892.

CHARLES W. BOND,
Notary Public.

[SEAL.]

34 *Answer of the Put-in-Bay Water-works, Light & Railway Company to Cross-bill of James K. Tillotson.*

Afterwards, to wit, on September 26, 1892, the Put-in-Bay Water-works, Light & Railway (Company) filed an answer to the cross-bill of J. K. Tillotson, and reads and is in words and figu.. llowing, to wit:

In the United States Circuit Court of the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *vs.* THE PUT-IN-BAY WATER-WORKS, LIGHT & Railway Company *et al.*, Defendants, } Answer to the Put-in-Bay Water-works, Light & Railway Company to the Answer and Cross-bill of the Defendant Jas. K. Tillotson.

The said defendant, The Put-in-Bay Water-works, Light & Railway Company, for answer to the answer and cross-bill of said defendant, James K. Tillotson, says, it admits that on or about the twenty-third day of April, 1891, the said defendant, Tillotson, procured to be incorporated this answering defendant, and that the articles of incorporation of this answering defendant authorized it to construct and operate an electric railway, water works and lighting apparatus on South Bass island; that the authorized capital stock of said company was $150,000, all of which was retained by said company, except the said five shares, which were distributed for the purpose of organizing said company.

This answering defendant further admits that for the purpose of procuring the means to construct said railway, said company caused to be issued, one hundred and twenty-five bonds of one thousand dollars each, dated the sixteenth day of June, 1892, and maturing the first day of July, 1912, which said bonds bore interest at the rate of six per cent., payable annually, and that said bonds were
35 secured by the said corporation issuing its mortgage upon all of its property to the Atlantic Trust Company, and which said mortgage was duly recorded in the county of Ottawa and State of Ohio.

2. This answering defendant further admits that on the first day of July, 1891, the said defendant, Tillotson, entered into a written contract with this answering defendant, whereby the said Tillotson agreed to convey certain property which he then held in his own right to this answering defendant, and that said defendant, Tillotson, further undertook by said contract to construct an electric railway and power-house and all other structures and machinery necessary for the completion and operation of this answering defendant's railway, water works and electric-light works,

This answering defendant further admits that the said Put-in-Bay Water-works, Light & Railway Company, by said contract and in consideration of the construction and completion of said railway by the said defendant, Tillotson, agreed to turn over to him, the said Tillotson, the capital stock and the bonds of said company as alleged in said answer and cross-bill.

And it further admits that said contract referred to is correctly set out by copy in Exhibit "A" attached to said answer and cross-bill.

3. This answering defendant says that at the time of the execution of the aforesaid contract by and between said company and the said defendant, Tillotson, the officers of said company were George H. Ketcham, president; J. K. Tillotson, vice-president and general manager, and F. M. Ohl, secretary and treasurer. That on the twenty-ninth day of April, 1891, at a meeting of the stockholders of said company, a resolution was introduced and unanimously adopted, authorizing the said company to enter into the aforesaid con-
36 tract with the said defendant, Tillotson, for the construction and completion of said company's railway and electric-light plant and to furnish and equip the said railway and electric-light plant. And the said resolution further provided that for the purpose of paying the said defendant, Tillotson, for the construction, completion, furnishing and equipping of said railway and electric-light plant, the said company *to* issue its bonds and stock in payment therefor. This answering defendant says that at the time of the issue of said bonds, and of the making of said contract aforesaid between said company and the said Tillotson, he, the said Tillotson, was vice-president and general manager of said company; and from the time said company was incorporated as aforesaid until the twenty-fifth day of July, 1892, the said company had possession of its said railway property and equipment, the said defendant, Tillotson, acting as the vice-president and general manager thereof. That on or about the twenty-fifth day of June, 1892, the said defendant, Tillotson, nego-

tiated with said defendant, The Industrial & Mining Guaranty Company of New York for the sale of said bonds of this answering defendant. That the negotiations for the sale of said bonds resulted in a contract entered into by and between the said Tillotson & the said Industrial & Mining Guaranty Company, a true copy of which is attached to said answer and cross-bill and marked Exhibit "B." This answering defendant says that in the negotiation and sale of said bonds, the said Tillotson acted for and in behalf of this answering defendant, and as its vice-president. That the said contract of sale was executed in the name of said company by its said vice-president. That said defendant, in making the sale of said bonds as aforesaid, and during all the negotiations therefor, represented said bonds to be the property of said company, and did not claim that the same belonged to him, or that he had any individual interest therein. And this answering defendant says, that notwithstanding the execution of said agreement of the first day of July, 1891, by and between the Put-in-Bay Water-works, Light & Railway Company and the said James K. Tillotson, for the construction of said railway, which

37 said contract is referred to as Exhibit "A" in said answer and cross-bill, it is not true that the said defendant, Tillotson, constructed or attempted to construct the said railway, or any part thereof, under and by virtue of said agreement; but, on the contrary, the said defendant, Tillotson, undertook the construction of said railway solely in the name of said company; that all material bought by him was purchased in the name of said companey, and was made an obligation against the same. That all contracts and agreements of every kind made by the said defendant, Tillotson, in the construction of said railway, were so made in the name of said company, and were made a charge and a liability against said company, and in no instance did the said Tillotson attempt to purchase material or construct said railway in his own name and upon his own responsibility. And this answering defendant says that the said defendant in the partial construction of said railway line created obligations, not only to the plaintiff herein, but to various other parties, in the name of said company; that said claims have not been paid, and that said parties have taken the necessary steps to complete mechanics' liens against the property of said company to secure them for material so sold as aforesaid. And this answering defendant therefore says that it is entitled to the proceeds of the said bonds and stock so negotiated and sold in its name as aforesaid by its said vice-president and general manager for the purpose of paying and discharging said claims and mechanics' liens.

4. This answering defendant further says that under the resolution passed by the stockholders, at their said meeting as aforesaid, the said defendant, Tillotson, was required to construct, complete and equip the said railway from a point near the Beebe house on said island to Hotel Victory and return, by the route laid out and surveyed and established by W. H. Wilhelm, engineer. This answering defendant says that the said defendant has not completed the said railway line in the manner provided as aforesaid.

38 5. That on the twenty-fifth day of July, 1892, at a meeting of the directors of said company, held at its office, No. 312 Summit street, Toledo, Ohio, the following officers were elected: President, John P. Carrothers; vice-president, John F. Cline; secretary, F. M. Ohl; treasurer, W. M. Earl. That then and thereafter the said defendant, Tillotson, ceased to be vice-president and general manager of said company, and had no connection therewith except as director thereof.

6. That said railway began operations as such on or about the sixth day of July, 1892. That thereafter, and until the twenty-fifth day of July, as aforesaid, the said defendant, Tillotson, operated said road as its vice-president and general manager. That on said twenty-fifth day of July it was understood and agreed that the said defendant should cease all connection in the management of said railway, and that the same should be turned over to the said John P. Carrothers, as president thereof. But this answering defendant says that said defendant, Tillotson, refused to surrender the possession of said railway, and continued to keep the forcible possession thereof until the third day of September, 1892. That from the sixth day of July aforesaid until the said third day of September the said company did a large and profitable business, and the receipts thereof were largely in excess of the necessary expenses incident to the operation of the same. That the said defendant, Tillotson, during all said time refused, and still refuses to turn over any of the receipts of said business to the said company, and neglected and refused to pay the employees thereof or to use said receipts in the interest and on behalf of said company; but, on the contrary, this answering defendant says that the said Tillotson wrongfully and fraudulently appropriated the receipts and proceeds of said business to his own use. That during all of said time the
39 said defendant was largely interested in and was endeavoring to operate Hotel Victory on said island, and that, for the purpose of maintaining and supporting the said hotel, the said defendant appropriated the moneys belonging to this answering defendant, being the receipts and proceeds of its business as aforesaid, to his own individual purposes as aforesaid, and to the interests of said hotel company.

7. This answering defendant is informed and believes, and therefore states the fact to be, that said Industrial & Mining Guaranty Company, the purchaser of said bonds and stock, is now willing, and has, since the said purchase, been willing to pay over to this answering defendant all moneys agreed to be paid by it for said bonds and stock, providing the same is used in the completion of said railroad, in perfecting its title to said property and in paying off and discharging the aforesaid mechanics' liens thereon. But that said purchaser is not willing to pay over the purchase price of said bonds and stock unless the same be expended and appropriated as aforesaid in the interests of this answering defendant.

8. This answering defendant says that at the time of the negotiation and sale of said bonds as aforesaid the said purchaser paid over

to the said defendant, Tillotson, as vice-president of said Put-in-Bay Water-works, Light & Railway Company the sum of fifteen thousand dollars. And this answering defendant alleges that it was the duty of said defendant, Tillotson, to use the money so paid over in the completion and construction of said railway. But, on the contrary, the said defendant used only a portion thereof for that purpose and the balance thereof, to wit, the sum of about seven thousand dollars thereof, the said defendant, Tillotson, appropriated to his own use, and to the use of said hotel company, and neglected and refused to use the same in the completion of said railway. And this answering defendant says that the said defendant, Tillot-
40 son, as vice-president of said railway company, and while in charge thereof failed to account, as aforesaid for the proceeds of its said business, and failed to expend the proceeds of the sale of its said bonds for and on behalf of said company.

Wherefore this answering defendant prays that the court may require the said defendant, Tillotson, to account for all moneys received by the said defendant, Tillotson, upon the sale of said bonds and stock, and for all moneys received by him in the operation of said road.

9. This answering defendant says it is not true that the said defendant, Tillotson, is the owner of said bonds, mortgage and stock, and it is not true that he is entitled to the possession thereof. It is not true that the said defendant, Tillotson, constructed and equipped said railroad from a point near the Beebe house to Hotel Victory. It is not true that the said defendant is, or has at any time been entitled to the proceeds of said railway.

10. The said Put-in-Bay Water-works, Light & Railway Company, further answering, says that it is entirely solvent, and desirous of completing its said road and putting the same in condition to be serviceable to the public and profitable to its stockholders.

11. This answering defendant further says that on or about the third day of September, 1892, the said defendant, Tillotson, attempting to interfere with the said company in the operation of its said railway, and to prevent the said company from the peaceable enjoyment of its said property, the common pleas court of Ottawa county, Ohio, on the petition of said Put-in-Bay Water-works, Light & Railway Company, issued a restraining order enjoining the said defendant, James K. Tillotson, from interfering or attempting to interfere in any manner with the said company in the operation of its railway, and which said restraining order is still in full force and effect.

41 And this defendant denies all and all manner of unlawful combination and confederacy wherewith *he* is by the said answer and cross-bill charged, without this, that there is any other matter, cause or thing in the said defendant's said answer and cross-bill contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied, is not true, to the knowledge and belief of this defendant. All which matters and things this

defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct.

THE PUT-IN-BAY WATER-WORKS, LIGHT & RAILWAY COMPANY.
E. W. TOLERTON, *Solicitor.*

STATE OF OHIO, *Lucas County,* } ss:

Northern District of Ohio, Western Division.

John P. Carrothers, president of the Put-in-Bay Water-works, Light & Railway Company, being duly sworn, says that the allegations contained in the foregoing answer are true.

JOHN P. CARROTHERS.

Sworn to before me and subscribed in my presence this twenty-fourth day of September, 1892.

CHAS. W. BOND,
[SEAL.] *Notary Public.*

42 Afterwards, on September 30, 1892, the answer and cross-bill of Arbuckle, Ryan & Company was filed herein and reads and is in words and figures following, to wit:

The Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY CO., a Corporation, &c., Plaintiff,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Co., The Railway Equipment Co., Arbuckle, Ryan & Co., *et al.*, Defendants.
} Answer and Cross-bill of Arbuckle, Ryan & Company.

To the judges of the U. S. circuit court:

Arbuckle, Ryan & Company, a copartnership doing business in Ohio, who have been made defendants in said suit, now come and bring this their cross-bill and say that on the 27th day of May, 1892, they entered into a written contract with the Put-in-Bay Water Works, Light and Railway Company, whereby they agreed to furnish said Put-in-Bay Water Works, Light and Railway Company certain machinery and perform certain work in accordance with the specifications attached to said contract.

They immediately proceeded to perform the labor and furnish, build, construct, and supply the machinery as in said contract called for, and they in all respects carried out the provisions of said contract.

The work, labor, material, and supplies so by them furnished were used in the construction of the power-house and railroad of the Put-in-Bay Water Works, Light and Railway Company.

The labor and materials furnished and performed by said
43 Arbuckle, Ryan and Company under said contract amounted in price to and were of the value of $16,825.00. In addition thereto there were extras furnished as a part of said work at request of said railway company which went into the construction of said railroad and power-house of the amount and value of $576.85; that there has been paid on said account the sum of $6,248.25, leaving a balance, as agreed upon between said Arbuckle, Ryan & Co. and said Put-in-Bay Water Works, Light and Railway Company, at the date of August 1st, 1892, due said Arbuckle, Ryan and Co. of $11,153.60, no part whereof has been paid. A true and correct copy of said contract is hereto attached, marked Exhibit "A," and a true and correct copy of said account is hereto attached, marked Exhibit "B."

Said Arbuckle, Ryan and Company further aver that said labor was performed and material furnished in the construction of the power plant as was specified in said contract and was done in and about and placed upon lots 471, 472, 473, 474, 475, Victory Park addition on Put-in-Bay or South Bass island, in the township of Put-in-Bay, Ottawa county, Ohio, and on and along the tracks, ties, poles, and other structures of the railroad of said defendant, The Put-in-Bay Water Works, Light and Railway Company, at said place.

Said Arbuckle, Ryan and Company further aver that within thirty days from the date of their performing the labor and furnishing materials, as aforesaid, they filed with the recorder of Ottawa county, Ohio, being the county where the labor was performed and the materials were furnished, an affidavit containing an itemized statement of the kind and amount of materials furnished and labor performed, the time when and the place where the same was done and performed, and the amount due therefore after crediting the payments and set-offs.

44 Said affidavit was filed on the 17th of August, 1892, at 5.05 p. m., and was subsequently recorded in a separate book provided for such purpose.

They also aver that within ten days after the filing of the affidavit with the said recorder, as aforesaid, a notice was served in writing upon the secretary of the Put-in-Bay Water Works, Light and Railway Company by delivering to him a notice in writing containing a statement of the fact of their filing such affidavit, the county wherein filed, and materials furnished, as aforesaid.

And so said Arbuckle, Ryan and Company aver that by virtue of the work done and materials furnished by them, as aforesaid, and by the proceedings, as aforesaid, they have obtained a lien upon the property in the petition described and upon the lots and lands aforesaid described and upon the railroad of the defendant The Put-in-Bay Water Works, Light and Railway Company prior to any other lien.

They therefore pray, first, that an account may be taken of the amount due and owing to them on their claim, as aforesaid; second, that said defendant, The Put-in-Bay Water Works, Light and Railway Company, may be decreed to pay to them the amount aforesaid

found due, with the costs, and that your cross-petitioners, Arbuckle, Ryan and Company, may have a lien for the amount so as aforesaid found due prior to other liens, and that an order may be made directing the sale of the lots and lands and the railroad, and from the proceeds of said sale the costs of this proceeding be first paid, and from the residue thereof the amount then found due and payable to Arbuckle, Ryan and Company; and these petitioners further pray for such further judgment as equity and good conscience may require.

HAMILTON & FORD,
Solicitors for said Arbuckle, Ryan & Co.

45 STATE OF OHIO, } *ss:*
Lucas County, }

John M. Arbuckle, being duly sworn, says that he is one of the members of the copartnership of Arbuckle, Ryan and Company, and that he has read the foregoing cross-bill and knows the contents thereof, and that the same are true, as he verily believes.

JOHN M. ARBUCKLE.

Sworn to before me and subscribed in my presence this 28th day of Sept., 1892.

M. C. FOGARTY,
Notary Public, Lucas County, Ohio.

46 *Motion of Receiver to Issue Receiver's Certifica-.*

On October 15, 1892, the receiver herein filed a motion in this cause; which said motion reads and is as follows, to wit:

United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Plaintiff,
vs.
THE PUT-IN-BAY WATER-WORKS, LIGHT & Railway Company *et al.*, Defendants.
} Motion of L. S. Baumgardner, Receiver.

This day came L. S. Baumgardner, heretofore by this court, in this cause, appointed receiver, and in person and by his counsel, A. W. Scott, makes the following statement and representations, to wit:

That upon his appointment as receiver as aforesaid he immediately took possession of all the property of the defendant railway company, which consisted mainly of a complete railroad track extending from the village of Put-in-Bay, on South Bass island, for the distance of about — miles to and around the building known as Hotel Victory; four electric-motor cars, standing upon said track without shelter and exposed to the weather; four "trailing cars," to be used in connection with the said motor cars, which are standing

upon an old dock in the yards of the Wabash Railway Company, in Toledo, Ohio, without cover and exposed to the weather, and subject to charges for freight from St. Louis to Toledo, demurrage and the cost of unloading; one power-house on South Bass island, with engines, dynamos and other appurtenances therein necessary for the production of power for the operation of an electric railway; the necessary poles and wires along the railway track for distributing the power as aforesaid, and other apparatus of minor detail, necessary in the operation of an electric railway.

That he received no money or evidences of indebtedness, and no money or credits of said railway company have since come into his hands as receiver as aforesaid.

47 That said South Bass island is a well-known summer resort, and during the summer and fall months is frequented by a large number of visitors, tourists and excursionists, at which times said railway has heretofore been, and can again be, operated successfully and at great profit, but during the winter and spring months, with no one on said island except those who reside there, said railway cannot be operated except at great pecuniary loss, and it will be necessary for said receiver to store said cars, and protect them from the weather during the coming winter, and care for and protect the engines, dynamos, motors and other apparatus and machinery incident to said railway, and to erect a building, and employ labor for that purpose.

And said receiver further represents to the court that to erect a proper car-house for the storing of said cars, and one suitable for the future use of said railway company, will cost not less than twenty-five hundred dollars ($2,500).

That the charges for freight, demurrage and cost of unloading the trailing cars in the Wabash yards as aforesaid is two hundred and fifty-six dollars ($256).

That to load said cars upon a vessel, transport them to South Bass island, unload them there and insure them on the trip over will cost two hundred dollars ($200).

That the expense incident to the care and preservation of the property, since it came into his hands as receiver, has been about two hundred and fifty dollars ($250), and that said receiver has reason to believe, and therefore avers it to be a fact, that to properly store and care for the property in his hands as receiver as aforesaid, during the coming winter, will cost, including the items before stated, not less than five thousand dollars ($5,000).

And said receiver further says that he has no means at his command for meeting this expense, unless authorized by this court to borrow the sums of money necessary to properly care for and store the said property, in his hands as receiver as aforesaid.

48 He further represents that he has reason to believe that if authorized by this court to issue receiver's certificates, bearing — per cent interest per annum, which shall be made a first lien upon all the property of said railway company, in his hands as receiver as aforesaid, that money can be procured upon said certificates at their par value.

Wherefore, said receiver prays the court for proper authority to issue, as the needs and necessities of the property in his hands may demand, certificates of indebtedness, not to exceed in the aggregate five thousand dollars ($5,000), and not to bear interest at a rate to exceed — per cent. per annum, to be disposed of by him at not less than par value, and the proceeds used in storing and otherwise caring for the property of said railway company, in his hands as receiver as aforesaid.

And said receiver shall ever pray.

By DOYLE, SCOTT & LEWIS,
His Counsel.
L. S. BAUMGARDNER, *Receiver.*

Order to Issue Receiver's Certificates.

Afterwards, on October 15, 1892, an order was made herein and entered on the chancery order book of said court, and reads and is as follows, to wit:

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER-WORKS, LIGHT & RAILWAY COMPANY *et al.*, Defendants.

This day this cause came on to be heard before the Honorable A. J. Ricks, one of the justices of this court, in chambers, at Cleveland, Ohio, on the motion of L. S. Baumgardner, receiver herein, for authority to issue and dispose of certificates of indebted-
49 ness, the proceeds to be used in the proper care and preservation of the property in his hands as receiver as aforesaid; and the said justice being fully advised in the premises, and having heard the representations of said receiver, and the arguments of counsel, finds that said motion should be granted, and it is therefore ordered that said L. S. Baumgardner, as receiver as aforesaid, issue his certificates of indebtedness, at such times and in such amounts as the needs of the property in his care as receiver as aforesaid may demand, which certificates shall become due and payable not more than one (1) year from the date thereof, and bear interest at not to exceed — per cent. per annum, and shall not exceed in the aggregate five thousand ($5,000) dollars.

And said certificates shall be payable out of any moneys which may come into the hands of said receiver, or other officer of this court, properly applicable thereto, either from the operation of said railway, or from the sale of the same, or any portion thereof, and said certificates are made a lien upon all the property of said railway company in the hands of said receiver, superior and prior to all other liens, excepting only costs and expenses of this action, which in any event shall be first paid.

And said receiver shall, from time to time, report to this court his action under this order, showing the amount of certificates issued by him, how the proceeds have been applied, together with such other matters as may be required by the court.

Done at chambers in the city of Cleveland, in said district, on the fifteenth day of October, A. D. 1892.

AUGUSTUS J. RICKS,
United States District Judge.

Motion to Dissolve Injunction.

Afterwards, on October 29, 1892, a motion to dissolve the
50 injunction herein was filed by the Industrial & Mining Guaranty Company, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *vs.* THE PUT-IN-BAY WATER-WORKS, LIGHT and Railway Company *et al.*, Defendants.	Motion for Dissolution of Injunction.

Now comes said defendant, The Industrial & Mining Guaranty Company, and moves the court for a dissolution of the injunction heretofore granted in this action, for the following reasons:

1. That no notice of the application for said injunction was given, either to this defendant or to said defendant, The Put-in-Bay Water-works, Light & Railway Company.

2. That the averments contained in the answer and cross-bill of the defendant, J. K. Tillotson, upon which the injunction was allowed, were and are untrue. And this defendant files affidavits herewith in support of this motion.

INDUSTRIAL & MINING GUARANTY COMPANY,
By E. W. TOLERTON, *Its Solicitor.*

Motion to Discharge Receiver.

On October 29, 1892, a motion to discharge receiver was filed herein, and reads and is in words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *vs.* THE PUT-IN-BAY WATER-WORKS, LIGHT & Railway Co. *et al.*, Defendants.	Motion to Discharge Receiver.

Now comes the said defendant, The Put-in-Bay Water-
51 works, Light & Railway Company, and moves the court to discharge the receiver heretofore appointed in this action, for the following reasons:

1. That no notice was given to said defendant company of said application for the appointment of said receiver.

2. That the averments contained in said answer and cross-bill of the defendant, J. K. Tillotson, upon which said receiver was appointed, were and are untrue. And this defendant herewith files affidavits in support of this motion.

PUT-IN-BAY WATER-WORKS, LIGHT & RAILWAY CO.,
By E. W. TOLERTON, *Its Solicitor.*

52 In the United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY COMPANY *et al.*, Defendants.

Affidavit of John P. Carrothers on Motion to Discharge Receiver.

STATE OF NEW YORK, }
New York County, } ss:

John P. Carrothers, being first duly sworn, says that he is president of the said The Put-in-Bay Water Works, Light & Railway Company; that on the 29th day of April, 1891, the said company was organized as a corporation under the laws of the State of Ohio by the election of George H. Ketcham, W. R. Kemball, W. R. Calkins, J. K. Tillotson, and F. M. Olds as directors of said company, and on the same day the said directors elected the officers of said company as follows: George H. Ketcham, president; J. K. Tillotson, vice-president and general manager, and Frank M. Olds, secretary and treasurer. Affiant further says that at the said meeting of said stockholders a resolution was introduced and unanimously carried authorizing the said company to enter into a contract with said James K. Tillotson for constructing and completing an electric railroad and electric-light plant for said company and furnishing and equipping the same and to issue bonds and stock in payment therefore, and also authorizing said company to make, execute, and deliver a mortgage on the property of said company to secure the issue of bonds to the amount of $100,000.

Affiant further says that on the 14th day of June, 1891, pursuant to a call regularly made, all the stockholders of said company were present at the office of said company, 312 Summit street, Toledo, Ohio; that a resolution was introduced at said meeting and unanimously carried, provided that it was necessary for the completion of the railway line of said company, to increase the issue of
53 bonds theretofore authorized, and the mortgage to secure the same, to the sum of $125,000, and that the president and the secretary of the company were by said resolution authorized to execute and deliver to a trustee the bonds of said company secured by a mortgage on all of its property, real, personal, and mixed, now

owned and thereafter to be acquired, for the sum of $125,000, payable twenty years after date, with interest at six per cent. per annum, payable semi-annually. Affiant further says that some time previous to the date last aforesaid the said company entered into a contract with said defendant, James K. Tillotson, its vice-president, general manager, and director, whereby the said Tillotson undertook and agreed to construct and complete the said railway plant of the plaintiff in all respects for and in consideration that the said company would transfer and deliver to him, the said Tillotson, the bonds and stock aforesaid of said company.

Affiant further says that at the meeting of said stockholders aforesaid on the 14th day of June, 1891, a further resolution was introduced and unanimously carried providing that the contract theretofore made by and between said company and said J. K. Tillotson be so amended as to harmonize with said resolution passed at said meeting aforesaid, and that the additional $25,000 of bonds be delivered to said Tillotson on account of said contract; that at said meeting a new board of directors was also elected, consisting of George H. Ketcham, Frank M. Olds, L. G. Richardson, N. G. Cochran, and J. K. Tillotson; that on the 14th day of June, 1892, at a meeting of the directors of said company, held at its office aforesaid, a motion was introduced and carried providing that the president and the secretary be authorized and directed, in compliance with the resolution of the stockholders of said company passed at a meeting held June 14, 1892, to execute and deliver to the Atlantic Trust Company of New York City, as trustee, 125 bonds of said company of $1,000 each,

payable on July 1st, 1912, with interest at the rate of six per
54 cent. per annum, payable semi-annually, and that said bonds

be prepared and executed in the usual form of such instruments. Affiant further says that said bonds were prepared and executed by said company as provided in said resolution, and that said mortgage was also executed according to law and filed for record with the recorder of said county, and that said stock to the amount of $150,000, being the authorized capital stock of said company, was also issued, and said bonds and mortgage and capital stock were all assigned, transferred, and delivered by said company to said James K. Tillotson absolutely in compliance with the contract theretofore entered into between said company and said Tillotson for the construction and completion of said railway line; and affiant says that then and thereby the said defendant, Tillotson, received full pay and satisfaction for the construction and completion of the said railroad for plaintiff, and that said company did not thereafter and does not now owe the said Tillotson any money whatever on account of the said contract or upon any other account.

Affiant further says that as soon as said Tillotson had received said bonds and stock aforesaid he offered the said bonds for sale upon the market, and soon thereafter succeeded in selling the same to the Industrial & Mining Guaranty Company in the city of New York; that upon the sale of said bonds and for the purpose of procuring the same the said Tillotson represented that said railway company was free and clear of all encumbrances of every kind; that

the title thereto was vested in the plaintiff company, and that the same was fully completed except as to equipment, and that it would be ready to open for business on the 29th day of June, 1892.

Affiant further says that the statements and representations so made by said Tillotson upon the sale of said bonds and for the purpose of procuring said sale were false and fraudulent, and were known to be false by said Tillotson when they were so made. Affiant says that said road was not then completed, and that the title thereto was not vested in said company, but, on the contrary, was held individually by the said James K. Tillotson, and that the right of way and property so held by said Tillotson for said company was not free and clear of encumbrances, but, on the contrary, the
55 said Tillotson had failed to pay for the same so far as he had constructed it, and owed therefor a very large amount, to wit, the sum of about $36,000. Affiant further says that on the 25th day of July, 1892, at a meeting of the stockholders of said company, pursuant to a call regularly made by the secretary thereof, at the office aforesaid, and at which meeting all the stockholders were present, either in person or by proxy, a resolution was introduced and unanimously carried increasing the number of directors of said company from five to nine, and thereupon and at the same meeting the following board of directors was elected, to wit: H. C. Post, George H. Ketcham, John F. Cline, H. D. Emerson, Frank W. Pierson, John P. Carrothers, E. W. Tolerton, H. B. Baruch, and James K. Tillotson, and that thereafter and on the same day, at a meeting of the directors of said company, the following officers of said company were elected, to wit: John P. Carrothers, president; John F. Cline, vice-president; F. M. Olds, secretary, and W. M. Earl, treasurer.

Affiant further says that some time in the month of July, 1892, the said railway company began the operation of its line, and that up to the 25th day of July, 1892, aforesaid, the said James K. Tillotson, as the vice-president and general manager of said company, operated the said railway in the name of said company, and that ever since and during all the time said railway has been operated it has been operated and conducted in the name of said company and not otherwise, and that said company during all this time had possession of said railway property and said business by and through its vice-president and general manager aforesaid and its other officers.

Affiant further says that at the time of the reorganization of said company, as aforesaid, to wit, on the 25th day of July, 1892, it was understood and agreed that on or before the 1st day of August of said year the said James K. Tillotson would convey and deliver the title to the right of way of said company, which at that time was vested in himself individually, as aforesaid, for and on behalf of said company, and that he would on said date relinquish all
56 connection of every kind with said company except as director.

Affiant further says that then or shortly thereafter he went to New York city with the intention of returning to Ohio on or about the first day of August, 1892, for the purpose of taking charge of said railway as its president, but on accou[illegible] of sickness affiant

was detained in New York for several weeks and was not able to return to Ohio until on or about the 19th day of August, 1892; that he then saw the said defendant, Tillotson, for the purpose of receiving from him the books, papers, muniments of title, personal property, and business of said company; that said Tillotson refused to surrender the same to affiant as the president of said company and for the same, but retained forcible possession thereof, collecting all the moneys received from the operation of said railway, refusing to turn the same over to said company, but, on the contrary, appropriated the same to his own use.

Affiant further says that on the 2d day of September, 1892, as president of said company he demanded possession of all the property of said company, including the cars, supplies, material, books, accounts, papers, and all other property of whatever kind belonging thereto; that the said Tillotson refused to deliver up possession thereof to affiant as president of said company and retained possession and control thereof individually without any right thereto.

Affiant further says that thereafter and on the 3d day of September, 1892, affiant, as the president of said company, was compelled to and did institute replevin proceedings to obtain possession of the personal property of said company, and that by virtue of said action the property of said company was turned over to affiant as the president thereof excepting the books, papers, muniments of title, and certain other of the personal property belonging to said company, which were taken and carried away and secreted by said defendant, James K. Tillotson, his servants and attorneys, and affiant says that he has not yet been able to find or procure the aforesaid property so taken away and secreted, as aforesaid.

57 Affiant further says that as soon as said property was turned over to affiant as president of said company the said defendant interfered with said company's possession and in many ways attempted to and did prevent the operation of said property by said company, and that said defendants carried away and secreted the motor cranks of the cars of said company; that said defendants carried away and secreted the pins connecting said cars with the motor power; that said defendants closed off the steam whereby said company was enabled to operate said property; that said defendants took and carried away the pump used in the operation of said property. All the aforesaid acts, as affiant avers, were done by said defendants for the purpose of interfering with the operation of said road by said company and preventing the said company from having peaceable possession of its property and enjoying the benefit thereof and operating the same, as it was authorized to do under its articles of incorporation.

Affiant further says that said defendant, James K. Tillotson, retained possession of said railroad without any right and for the sole purpose of appropriating to himself the proceeds of the said business; that during the months of July, August, and September, 1892, the receipts of said road were very large, and said Tillotson, without any right in the management and control thereof, retained possession thereof individually and not for said company for the purposes afore-

said, and that during all this time the said Tillotson neglected and refused to pay the running expenses of said road, including the repairs and the wages due employés thereof, but, on the contrary, as aforesaid, did appropriate to himself individually the entire proceeds thereof except a small part thereof paid to employés; and affiant further says that under the contract between said company and said Tillotson, as aforesaid, the said Tillotson was bound to construct and complete said road in all respects; that said bonds and stock were delivered and turned over to said Tillotson for the purpose of paying him for the entire construction and completion of said road; that said Tillotson represented, as aforesaid, to the said purchasers of said bonds the said railroad was completed, but affiant
58 says that said representations were false and were known by said Tillotson to be false; that said road was not completed either in whole or in part, and affiant says that it will take at least twenty thousand dollars to complete the construction of said road and put the same in the condition which the said defendant, Tillotson, was bound to put the same under his contract and in which condition here presented the said road to be when he sold the bonds, as aforesaid.

Affiant further says that after the said defendant, Tillotson, had received the bonds and stock aforesaid in full payment for the construction and completion of said road the said defendant, on the 20th and 22d day of June, 1892, fraudulently and without authority issued the promissory notes of said company for the sum of twenty thousand and sixteen dollars and sixty-six cents to the Westinghouse Electric and Manufacturing Company, which said notes were signed in the name of said company and by said Tillotson as its vice-president and general manager, and the said Tillotson thereby attempted to obligate the said company to the payment of a large amount for which said company was in no way obligated to pay, but, on the contrary the said Tillotson was individually bound to pay under his contract, as aforesaid, for the construction of said road.

Affiant says that by this method and by the acts aforesaid the said Tillotson kept possession of said road wrongfully and refuses to deliver up the same to affiant as the president of said company, as aforesaid, solely for the purpose of receiving personal benefit therefrom and in fraud of the rights of said company; and affiant further says that after the said Tillotson had received payment in full for the construction of said railroad he fraudulently and without authority used the name of said company in the purchase of material and attempted, so far as he could, to obligate said company for the payment thereof.

Affiant further says that in the partial construction of said railroad by said defendant, Tillotson, he purchased material from Arbuckle, Ryan & Company, of Toledo, Ohio, to the amount of about eleven thousand dollars and in the name of said railway
59 company; that he has never paid therefor, and that the said indebtedness still remains unpaid; that said Arbuckle, Ryan & Company *has* taken a mechanics' lien upon the property of said company to secure their said claim against it; and affiant says that

said indebtedness was contracted by said Tillotson after he claims that said bonds and stock had been delivered to him in payment for the construction and completion of said railroad, as aforesaid.

Affiant says that he is informed, believes, and therefore states the fact to be, that the said defendant, James K. Tillotson, is insolvent and financially irresponsible, and that said company has no redress at law against him for the moneys which he has already appropriated, as aforesaid, and which he might appropiate in the operation of said road if he were allowed to retain possession thereof.

Affiant says that he has heretofore in this affidavit referred to resolutions of the stockholders and directors of said company; that said resolutions are recorded in the book of records of said company, which book is hereto attached, marked Exhibit "A," and made a part hereof.

Affiant has stated in this affidavit that after the said bonds and stock were turned over to the said Tillotson, as aforesaid, and from the time said railroad began to be operated it was so operated and managed by said defendant, Tillotson, as vice-president and general manager of the company and not otherwise. In support of this allegation affiant refers to the envelopes issued by said company, one of which is hereto attached, marked Exhibit "B," and made part hereof, which said envelope was prepared by said defendant, Tillotson, as vice-president and general manager of said company and used in the operation of said road by him, as aforesaid.

Affiant also refers to the tickets prepared and issued by said defendant, Tillotson, while so operating said railroad, one of which is hereto attached, marked Exhibit "C," and made a part hereof.

Affiant has also stated heretofore in this affidavit that on the 2nd day of September, 1892, he made a formal and written demand for the possession of said property, which was held by said defendant,
Tillotson, individually and without and authority, and af-
60 fiant attaches hereto a copy of said written demand, which is
marked Exhibit "D" and made a part of this affidavit.

Affiant states that on the 3d day of September, 1892, as president of said company he took possession of said railway for the purpose of operating the same for the accommodation and convenience of the public, but the said defendant, James K. Tillotson, without any right, interfered to prevent the affiant operating said railway on behalf of said company, and the said Tillotson then and there conspired with his agents and servants to prevent the said company from enjoying the rightful possession of its property; that for the purpose of carrying out said conspiracy the said defendant, Tillotson, his agents and servants, took and carried away and secreted the motor crank- of said cars used upon said railway; that they carried away and secreted the pins used on said cars and connecting the same with the electric power; that they stopped the pump which brought water from the lake to furnish power to operate said railway, and that they cut off the steam used in the operation of said railroad; and thereupon and to prevent the said Tillotson, his agents and servants, from such unlawful and forcible interference with the said company's possession and operation of its property

the said company obtained from the common pleas court of Ottawa county a restraining order, a certified copy of which is hereto attached, marked Exhibit E.

And this affiant says further that the aforesaid wrongful and unlawful acts of the said Tillotson in interfering with the management of said railway by said company and in the appropriation of the proceeds thereof to his own use will render it impossible for said company to pay the interest at its maturity on said bonds so sold to the said Industrial & Mining Guaranty Company; that the appointment of the receiver in this action has greatly depreciated said securities, and if said receiver is permitted to retain control of said property and prevent the company from having possession, controlling and completing its said railway, the said property will greatly depreciate in value, and that, in consequence thereof, the said bonds will largely decline in value and the said stock will become
61 worthless, and that, in consequence, the said company and the owners of said bonds and stock will suffer great and irreparable injury.

JNO. P. CARROTHERS.

Sworn to before me and subscribed in my presence this 20th day of October, 1892.

[SEAL.] JAMES P. J. MORRIS,
70, *Notary Public, N. Y. Co.*

EXHIBIT "E."

Also attached to said affidavit of said Carrothers was the following exhibit, to wit:

Certified Copy of Journal Entry.

STATE OF OHIO, } ss:
Ottawa County, }

In the Court of Common Pleas, September Term, 1892.

Journal, vol. 9, page 465.

THE PUT-IN-BAY WATER-WORKS, LIGHT & RAILWAY COMPANY, Plaintiff,
vs.
J. K. TILLOTSON ET AL., Defendants.

Certified copy of journal entry.

This cause now came on to be heard upon the plaintiff's petition and motion for a preliminary restraining order upon the facts therein stated.

Upon due consideration, the court being fully advised, finds that said motion for a preliminary injunction should be and the same is hereby granted.

It is ordered and adjudged that said defendants, and each of them

be and they are hereby restrained and enjoined until the further order of this court from in any manner interfering with the plaintiff's peaceable enjoyment of the possession and control of said Put-in-Bay Water-works, Light & Railway Co., its property and business, and the said defendants and each of them are especially enjoined and restrained from shutting off the steam or stopping the pump so as to interfere with the plaintiff's possession and control and operation of its said property.

It is ordered that this decree shall take effect upon the plaintiff giving an undertaking, as provided by law, in the sum of $5,000, to the satisfaction of the clerk of this court.

MALCOLM KELLEY, *Judge.*

September 5, 1892.

62 *Certificate of Clerk of Ottawa County Common Pleas.*

THE STATE OF OHIO, } *ss:*
Ottawa County, }

I, Wm. C. Wunman, clerk of the court of common pleas within and for said county, and in whose custody the files, journals and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the journals of the proceedings of said court within and for said county, and the said foregoing copy has been compared by me with the original entry on said journal, and that the same is a correct transcript thereof.

In testimony whereof, I have hereunto subscribed my name officially, and affixed the seal of said court at the court-house, in Port Clinton, in said county, this 20th day of September, A. D. 1892.

WM. C. WIERMAN, *Clerk.* [SEAL.]

(Endorsement:) United States circuit court, no. dist. Ohio, western div. Electrical Supply Co., complainant, *vs.* Put-in-Bay Water Works, Light & Railway Co. *et al.*, def'ts. Affidavit of Jno. P. Carrothers on motion to discharge receiver. Filed Oct. 29, 1892. Irvin Belford, clerk.

63 *Affidavit of F. S. Terry and Exhibits.*

Afterwards, on the twelfth day of November, 1892, an affidavit of F. S. Terry was filed herein, and reads and is in words and figures following, to wit:

Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER-WORKS, LIGHT AND Railway Company *et al.*, Defendants.

Affidavit of F. S. Terry.

STATE OF ILLINOIS, *County of Cook*, } ss:

Franklin S. Terry, being first duly sworn, deposes and says that he is a citizen and resident of the city of Chicago, county of Cook and State of Illinois, and that he is the manager and attorney-in-fact of The Electrical Supply Company, the plaintiff herein: that the said company is located and doing business in the city of Chicago, at the corner of Randolph street and Michigan avenue, under affiant's control and direction.

Affiant further states, that on or about the sixth day of September, 1892, the said plaintiff corporation had a claim against the defendant, The Put-in-Bay Water-works, Light & Railway Company, for the sum of twenty-seven hundred and eighty-seven dollars and four cents ($2,787.04), which said claim is duly set out in the schedule attached to said plaintiff's petition in this action and made a part thereof.

That, on or about the sixth day of September, 1892, the said plaintiff corporation was approached by one L. G. Richardson, who was at that time entirely unknown to affiant, and who represented himself to be an attorney practicing at Toledo, O., and further represented that he was familiar with the affairs of the Put-in-Bay Water-works, Light & Railway Company, and advised the plaintiff corporation to file a lien against the Put-in-Bay Water-works, Light
64 & Railway Company for the amount of its claim and to authorize him to commence suit against the Put-in-Bay Water-works, Light & Railway Company in behalf of the Electrical Supply Company, and to bring suit in the Federal court asking foreclosure of said lien — for an accounting. That the object of said suit was for the purpose of enabling the defendant, J. K. Tillotson, to file thereon his cross-petition for the purpose of having a receiver appointed.

On the fifteenth of September, 1892, the said plaintiff corporation received a letter from the said L. G. Richardson, its attorney, stating that he had filed lien against the said defendant corporation, and had immediately brought suit in our name, asking for said foreclosure and accounting; that Mr. Tillotson filed his answer and cross-bill upon this, and the receiver was appointed, which said letter is hereto attached, marked Exhibit "No. 1."

Affiant says that the said plaintiff corporation was induced and led into said proceedings innocently and ignorant of facts, which had been suppressed by J. K. Tillotson and the said L. G. Richardson; that they were unaware that the said defendant corporation had been reorganized on the twenty-fifth day of July, 1892, and that the said

J. K. Tillotson had been voted out of office by the directors; that Mr. Tillotson represented to the representatives of this company, after said twenty-fifth day of July, and as late as the nineteenth of August, that he was still the vice-president of said defendant corporation.

That this plaintiff corporation was induced to include all sums due for material furnished for use of the Hotel Victory Company in our account against said railroad; that the material actually used in the construction of the Put-in-Bay Water-works, Light & Railway Company amounted to eight hundred and sixty-one dollars and twenty-three cents ($861.23); that the balance of said material, to the amount of one thousand nine hundred and twenty-five dollars
65 and eighty-one cents ($1,925.81), was used inside of said Hotel Victory. Affiant says, that all of said material was ordered by the said defendant, J. K. Tillotson, as vice-president of said defendant corporation; that it was shipped to the said defendant corporation, and was charged upon the books of the plaintiff corporation to the said Put-in-Bay Water-works, Light & Railway Company.

This affiant further says that the allegation in its said petition, wherein the said plaintiff corporation is made to allege that it furnished said material to J. K. Tillotson, either as an individual or the contractor is untrue, and was known to be untrue by said Tillotson and said attorney L. G. Richardson. That the said Richardson prepared the lien and said plaintiff's petition filed in this action, and advised this plaintiff's representative as its attorney, that said lien and the allegations of said petition were proper ones for this plaintiff to verify; and in accordance with his advice said petition was verified by the representative of this plaintiff corporation.

This affiant says, that on the twenty-seventh day of July, 1892, they made a draft upon the said Put-in-Bay Water-works, Light & Railway Company for a portion of their claims aforesaid, viz: $1,283.25, and duly sent the same forward for collection; that the said draft was returned unpaid, and said affiant was informed and believes that the said draft was never presented to the proper officers of the company for payment; that if presented to the said J. K. Tillotson, and refused by him, that at that time he had no authority to refuse payment, and the records of the said Put-in-Bay Water-works, Light & Railway Company, as this affiant is informed and believes, shows such as the fact to be.

That, on the thirteenth day of September the affiant corporation wrote a letter of inquiry to the said Richardson, which letter is hereto attached, marked Exhibit "No. 2."

FRANKLIN S. TERRY.

66 Subscribed and sworn to before me this first day of November, 1892.

JOSEPH SCHNEIDER,
Notary Public.

[SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Wulf, clerk of the county court of Cook county, the same being a court of record, do hereby certify that Joseph Schneider, Esq., whose name is subscribed to the annexed jurat, was, at the time of signing the same, a notary public in Cook county, duly commissioned, sworn and acting as such, and authorized to administer oaths; that I am well acquainted with the handwriting of said notary, and I verily believe that the signature to the said jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of Chicago, in the said county, this first day of November, 1892.

[SEAL.] HENRY WULF, *Clerk.*

67 EXHIBIT No. 1.

L. G. Richardson, attorney, 63 Produce Exchange, Toledo, O.

9, 15, '92.

The Electrical Supply Co., Chicago, Illinois.

DEAR SIR: Your favor of the 13th received. I filed your lien against the Put-in-Bay W. W., L. & R'y Co. for record with the recorder of Ottawa county, this State, and immediately brought suit in your name asking for a foreclosure of said lien and for an accounting in the United States court. Mr. Tillotson filed his answer and cross-bill, and upon this the receiver was appointed. I think your claim is perfectly safe and will keep you posted as anything turns up.

The hotel receivership was merely a precautionary move and I think will not effect your claim, though it may be some little time before the affair is straightened out. I wish you would mail me a copy of your account against the hotel Co., that I may prepare the necessary affidavit and file with the recorder.

Yours very truly,

(Signed) L. G. RICHARDSON.

EXHIBIT No. 2.

HDA-Y

9, 13, '92.

Mr. L. G. Richardson, 63 Produce Exchange, Toledo, O.

DEAR SIR: Will you kindly advise us as to the result of your proceedings against the Put-in-Bay W. W'ks, L. & R'y Co.? Did you file the lien, and is our account secure? We note the appointment of a receiver for the hotel and presume that our little account there is lost. We hope, however, that the account against the railway company is not at all hazardous.

Yours truly,

THE ELECTRICAL SUPPLY CO.,
ACCOUNTING DEP'T,

(Signed) By H. D. AMES, *Cashier.*

(Endorsement:) #1087. U. S. court. Electrical Supply Co. *vs.* Put-in-Bay Water Works, Light & R'y Co. Affidavit of F. S. Terry. Filed Nov. 12, 1892. Irvin Belford, clerk. E. W. Tolerton.

68 *Motion of Receiver to Issue Certificates.*

On December 21, 1892, the receiver herein filed a motion in this cause, which said motion reads and is as follows, to wit:

In the United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Plaintiff, *vs.* THE PUT-IN-BAY WATER-WORKS, LIGHT & Railway Company *et al.*, Defendants. } Motion of L. S. Baumgardner, Receiver.

This day came L. S. Baumgardner, heretofore appointed receiver in this case by the court, and in person and by his counsel, Doyle, Scott & Lewis, makes the following statements and representations, to wit:

That by a former order of this court, granting him authority thereto, he has issued certificates of indebtedness to the amount of five thousand ($5,000) dollars, and has expended the same in constructing a car-house for the protection of the cars of the defendant, The Put-in-Bay Water-works, Light & Railway Company, properly caring for the engine, dynamos, and other appurtenances of said defendant, paying freight charges and demurrage, cost of shipping four cars from Toledo to Put-in-Bay, and payment of labor claims under the order of this court, and that he has expended the entire sum of five thousand ($5,000) dollars, so authorized by said court, and that there are a large number of labor claims yet unpaid, for which there is no money available in the hands of said receiver, and no money to pay for the care of the property in his hands as receiver during the coming winter.

69 And said receiver further says that he has no means at his command for meeting this expense and for the payment of said labor claims unless authorized by this court to borrow sums necessary to properly care for and store said property in his hands as receiver as aforesaid and to pay said labor claims.

And said receiver avers that it will take about the sum of five thousand ($5,000) dollars to pay said claims and care for said property aforesaid.

He further represents that he has reason to believe that if authorized by this court to issue receiver's certificates of indebtedness, bearing — per cent. interest per annum, in the sum of five thousand ($5,000) dollars which shall be made a first lien upon all the property of the said defendant, The Put-in-Bay Water-works, Light & Railway Company, in his hands as receiver aforesaid, that money can be procured upon said certificates at their par value.

Wherefore said receiver prays the court for proper authority to

issue, as the needs and necessities of the property in his hands may demand and for the payment of labor claims, certificates of indebtedness not to exceed in the aggregate five thousand ($5,000) dollars and not bear interest to exceed the rate of said — per cent. per annum, to be disposed of by him at not less than par value, and the proceeds to be used for the payment of labor claims under the orders of this court and in caring for the property of said defendant, The Put-in-Bay Water-works, Light & Railway Company, in his hands as receiver as aforesaid.

The said receiver shall ever pray, etc.

L. S. BAUMGARDNER,
By DOYLE, SCOTT & LEWIS, *His Att'ys.*

70 *Motions Overruled—Order to Deposit Bonds.*

Afterwards, on December 22, 1892, a day of the December term of said court, A. D. 1892—present, the Honorable Augustus J. Ricks, district judge—an order was made and entered herein which reads and is in words and figures following, to wit:

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY COMPANY *et al.*, Defendants.

This day this cause came on to be heard upon the motion of the defendant The Put-in-Bay Water Works, Light & Railway Company to discharge the receiver heretofore appointed herein and to modify the order to said receiver to issue certificate of indebtedness and the motion of the defendant The Industrial & Mining Guaranty Company for a dissolution of the injunction heretofore granted in this action, and the court, having heard the evidence and the arguments of counsel and now being fully advised in the premises, does overrule each and all motions.

And it appearing to the court that the certain one hundred and twenty-five (125) first-mortgage bonds of the defendant The Put-in-Bay Water Works, Light & Railway Company, in dispute in this —, and one hundred thousand ($100,000) dollars of the capital stock of said water works, light and railway company, also in dispute herein, are in the possession of and controlled by the defendant The Industrial & Mining Guaranty Company and by the defendants John P. Carrothers and H. H. Warner; and it further appearing to the court that the rights, interests, and equities of all parties interested in said bonds and stock can be better and more certainly preserved if said bonds and stocks are in the possession and under the control of the court, it is therefore ordered that said defendants, The Industrial & Mining Guaranty Company, John P. Carrothers, and H. H. Warner, deliver said bonds and stock to the custody of the clerk of this court on or before the fifth day of January, 1893, and that the same be retained in the custody of said clerk for the care and pres-

ervation of the same and for the purpose of preserving the
71 interests of all parties therein as may be determined upon the further hearing of this suit.

And, on motion to the court and for good cause shown, it is ordered that this cause and all questions herein be, and the same is hereby, referred to Irvin Belford, who is hereby appointed a special master commissioner for that purpose, who shall forthwith, upon being duly qualified, proceed to take the testimony offered by the parties, in writing, and report the same to the court, with his conclusions on the law and facts involved in the issue, without unnecessary delay.

Order to Issue Receiver's Certificates.

Afterwards, on December 22, 1892, a day of the December term of court in said year, present Hon. Augustus J. Ricks, district judge, an order was made and entered herein as follows, to wit:

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER-WORKS, LIGHT & RAILWAY Company *et al.*, Defendants. } Equity.

This day this cause came on to be heard before Honorable Augustus J. Ricks, one of the justices of this court, on the petition of L. S. Baumgardner, receiver herein, for authority to issue and dispose of certificates of indebtedness, in addition to the receiver's certificates heretofore by order of the court, entered October 17, 1892, authorized to be issued, the proceeds to be used in the proper care and preservation of the property on his hands as receiver as aforesaid; and the said justice being fully advised in the premises, and having heard the representations of said receiver and the
72 arguments of counsel, finds that said motion should be granted, and it is therefore ordered that said L. S. Baumgardner, as receiver as aforesaid, issue his certificates of indebtedness at such times and in such amounts as the needs of the property in his care as receiver as aforesaid may demand, which certificates shall become due and payable not more than one (1) year from the date thereof, and bear interest at not to exceed — per cent. per annum, and shall not exceed in the aggregate five thousand dollars ($5,000).

And said certificates shall be payable out of any moneys which may come into the hands of said receiver, or other officer of this court practically applicable thereto, either from the operation of said railway or from the sale of the same, or any portion thereof, and said certificates are made a lien upon all the property of said railway company in the hands of said receiver, superior and prior to all other liens, excepting only the certificates authorized by court heretofore to be issued as aforesaid, and the costs and expenses of this action, which in any event shall be first paid.

And said receiver shall from time to time report to this court his action under this order, showing the amount of certificates issued by him, how the proceeds have been applied, together with such other matters as may be required by the court.

73 *Petition for Appeal—Petition Allowed.*

On January 20, 1893, a petition for appeal herein by the Industrial & Mining Guaranty Company, with allowance of said appeal endorsed thereon, was filed in this cause, and reads and is as follows, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *vs.* THE PUT-IN-BAY WATER-WORKS, LIGHT & Railway Company, The Railway Equipment Co., Arbuckle, Ryan & Co., Jas. K. Tillotson, The Cleveland Electrical Manufacturing Company, The Industrial & Mining Guaranty Co., John P. Carrothers, and H. H. Warner, Defendants.	Petition for an Appeal.

Now comes the appellant, The Industrial & Mining Guaranty Company, a corporation organized under the laws of the State of New Jersey, with its principal office in the State of New York, and here says to the court that in the proceedings and judgment in the cause now pending herein, wherein the said The Industrial &
74 Mining Guaranty Company was defendant, and the said Electrical Supply Co., one of said appellees, was complainant, and The Put-in-Bay Water-works, Light & Railway Company, The Railway Equipment Company, Arbuckle, Ryan & Co., James K. Tillotson, The Cleveland Electrical Manufacturing Company, The Industrial & Mining Guaranty Company, John P. Carrothers and H. H. Warner were defendants, there was manifest error in said record and proceedings, in this, to wit:

1. That the said court erred in overruling the motion of appellant to discharge an injunction theretofore granted in said action and in continuing said injunction.

2. That said court erred in retaining jurisdiction of said cause.

Whereupon, the said appellant asks for the allowance of an appeal herein, and that the amount of the supersedeas bond be fixed by the court, and that citation (issue) in pursuance of the statute in such case made and provided.

By E. W. TOLERTON,
Attorney for Appellant.

Allowed:
AUGUSTUS J. RICKS,
United States District Judge.

Endorsed: Filed January 20, 1893. Irvin Belford, clerk.

Appeal Bond.

Afterwards, on January 24, 1893, an appeal bond was filed herein, and reads and is in words and figures following, to wit:

Know all men by these presents, that we, The Industrial & Mining Guaranty Company, as principal and E. W. Tolerton, as sureties, are held and firmly bound unto James K. Tillotson in the full and just sum of two hundred and fifty dollars, to be paid to the
75 said James K. Tillotson, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at a session of the circuit court of the United States, for the northern district of Ohio, western division, in a suit depending in said court, between the Electrical Supply Company and the Put-in-Bay Water-works, Light & Railway Company, Arbuckle, Ryan & Company, James K. Tillotson and the Cleveland Manufacturing Company, a decree was rendered against the said The Industrial & Mining Guaranty Company, overruling their motion to dissolve an injunction against the said The Industrial & Mining Guaranty Company and others, and the said The Industrial & Mining Guaranty Company, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said James K. Tillotson, citing and admonishing him to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the twentieth day of February next.

Now, the condition of the above obligation is such, that if the said The Industrial & Mining Guaranty Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

[SEAL.] THE INDUSTRIAL & MINING GUARANTY COMPANY.

[SEAL.] E. W. TOLERTON.

Approved by—

AUGUSTUS J. RICKS,
U. S. District Judge.

January 21, 1893.

76 *Citation.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

To James K. Tillotson, Greeting:

Whereas, the Industrial & Mining Guaranty Company have lately appealed to the United States circuit court of appeals for the sixth circuit from a decree lately rendered in the circuit court of the United States, for the northern district of Ohio, made in favor of you, the said James K. Tillotson, which said decree overruled the motion of said appellant to discharge the injunction against said appellant, and has filed the security required by law; you are therefore cited to appear before the said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, in said circuit on the twentieth day of February, next, to do and receive what may appertain to justice to be done in the premises.

Witness, the Honorable Augustus J. Ricks, judge of United States district court for the northern district of Ohio, this twenty-first day of January, in the year of our Lord one thousand, eight hundred and ninety-two, and of the Independence of the United States of America, the one hundred and seventeenth.

AUGUSTUS J. RICKS,
United States District Judge.

[SEAL.]

We hereby acknowledge service of the within citation.

DOYLE, SCOTT & LEWIS,
Solicitors for Respondent.
JAMES K. TILLOTSON.

Toledo, O., January 26, 1893.

77 *Clerk's Certificate.*

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY
vs.
PUT-IN-BAY WATER-WORKS, LIGHT & RAILWAY Company *et al.* } Equity. No. 1087.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States, for said district, do hereby certify that the annexed and foregoing pages contain a full and true copy of the original pleadings, records and proceedings in the above case, as fully hereinbefore entitled, so full and entire as the same remains of record, and on file in my office, and now under my custody as clerk of said court.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Toledo, in said district, on this seventh day of February, A. D. 1893, and of the 117th year of the Independence of the United States of America.

[SEAL.]

IRVIN BELFORD, *Clerk*,
By FORD BELFORD,
Deputy Clerk.

78 United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY COMPANY *et al.*, Defendants.

No. 1087. In Chancery. Intervening Petition of Barbour & Starr.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, western division:

Now comes the defendants Marcus V. Barbour and Rowland Starr and say they are copartners doing business in the city of Toledo, Ohio, under the firm name and style of Barbour & Starr, and were at the dates and times hereinafter mentioned.

Said answering defendants for their intervening petition in the above-entitled suit say and show to this honorable court as follows:

That on or about the 2nd day of June, 1892, the said answering defendants made and entered into a parole contract with the said defendant, The Put-in-Bay Water Works, Light & Railway Company, by James K. Tillitson, its authorized agent, acting for said Put-in-Bay Water Works, Light & Railway Company, whereby said intervening defendants furnished to the said The Put-in-Bay Water Works, Light & Railway Company goods and merchandise to be used and which were used by the said The Put-in-Bay Water Works, Light & Railway Company in the construction of its power-house and station, on lots Nos. 471 to 475, inclusive, in Victory Park addition, on Put-in-Bay or South Bass island, Ottawa county, State of Ohio, amounting in the aggregate to the sum of $990.43.

That there has been paid upon said account by said The Put-in-Bay Water Works, Light & Railway Company the sum of $451.69, which leaves a balance justly due and unpaid to said invervenors from the said The Put-in-Bay Water Works, Light & Railway Company of the sum of $538.74.

Said intervenors say that hereto attached, marked Exhibit "A," and made part hereof, and to which reference is made, is a statement showing the material and value thereof furnished by said Barbour & Starr to the said The Put-in-Bay Water Works, Light & Railway

79 Company under said parole contract from the 2nd day of June to the 21st day of June, inclusive, 1892; that the items and the values thereof as named in said account are correct, just, and true.

That upon the 5th day of October, 1892, the said Barbour & Starr

made affidavit to their said claim as in such cases made and provided, in accordance with the laws and statutes of the State of Ohio, for the purpose of making a lien upon the premises hereinbefore described for the amount of the balance due them upon their said claim; that said claim, properly attested, was upon the 6th day of October, 1892, filed with the recorder of Ottawa county and recorded in volume 3, pages 14 and 15, of the Ottawa county, Ohio, record of liens; which said account, so attested, is hereto attached as an exhibit and made part hereof, the said Exhibit "A" thereto attached being the account hereinbefore referred to.

Said intervenors say that there is now justly due them upon said lien and account from the said The Put-in-Bay Water Works, Light & Railway Company the sum of $538.74 and interest thereon from the 21st day of June, 1892; that the amount of the same is a lien upon the property described in said intervening petition as of date the 2nd day of June, 1892.

That although said defendant has been asked to pay said sum, yet it has neglected and refused so to do.

Wherefore said invervenors ask that said sum so averred to be due to them be decreed a lien upon said premises as of date the 2nd day of June, 1892; that said premises may be ordered sold, and that out of the proceeds arising therefrom said claim of said intervenors herein, with interest, be paid in full, and for such other and further relief as in equity they may be entitled to.

E. D. POTTER, JR.,
Solicitor for Barbour & Starr.

80 STATE OF OHIO, }
Lucas County, } *ss:*

Rowland Starr, being by me duly sworn, on his oath deposes and says that he is a member of the firm of Barbour & Starr, intervenors in the foregoing suit; that the facts and allegations contained in their foregoing intervening petition are true, as said affiant verily believes.

ROWLAND STARR.

Sworn to before me by the said Rowland Starr and signed in my presence this 17th day of February, 1893.

JAMES W. LYONS,
Notary Public, Lucas County, Ohio. [SEAL.]

(Endorsement:) U. S. circuit court, north. dist. of Ohio, western division. No. 1087. The Electrical Supply Co. *vs.* The Put-in-Bay Water Works, Light & R'y Co. & *al.* Intervening petition of Barbour & Starr. Filed Feb. 18, 1893. Irvin Belford, clerk. E. D. Potter, Jr., solicitor for Barbour & Starr.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & Railway Company *et al.*, Defendants.

Answer of the Bodifield Belting Company.

And now comes the Bodifield Belting Company, a corporation organized and existing under the laws of the State of Ohio and doing business as such in the city of Cleveland, in said State of Ohio, and for answer to the bill of the complainant filed herein says:

1st. That there is due to this defendant from the defendant The Put-in-Bay Water Works, Light & Railway Company the sum of $338.11, which it claims, with interest thereon, at the rate of 6 %, from the 7th day of Sept., 1892, on an account, a true copy of the original of which is hereto attached, marked "Exhibit A," and made part of the answer and cross-petition, and there are no credits or payments thereon of either principal or interest.

2nd. That said account set forth in the first paragraph above (and said original account hereto annexed) accrued for materials furnished and labor done by this defendant for the said defendant, The Put-in-Bay Water Works, Light & Railway Co., in, about, and upon the power-house of said The Put-in-Bay Water Works, Light & Railway Company, which furnishes the light and power for the lighting of Hotel Victory, on Put-in-Bay island, and the power for the propelling of the electric cars upon the electric railway from said Hotel Victory to the bay called "Put-in-Bay," on said Put-in-Bay island, and for the pumping of water for the water works which supplies said Hotel Victory with water between the 28th day of June
82 and *and* the 22d day of July, 1892, and that said machinery, power-house, and materials contained therein are situate on certain premises of the defendant The Put-in-Bay Water Works, Light & Railway Company and described as follows, viz: Situated in the island of Put-in-Bay or South Bass, in the county of Ottawa and State of Ohio, and known as and being lots Nos. 471, 472, 473, 474, & 475 of Victory Park addition, on South Bass or Put-in-Bay island, in Put-in-Bay township, Ottawa county, Ohio.

3d. That said account accrued on the 28th day of June, 1892, and on the 7th day of Sept., 1892, this defendant filed with the recorder of Ottawa county, Ohio, under the statute providing and provided for obtaining mechanics' liens, an affidavit containing an itemized account of the amount and value of such materials furnished and labor performed, and which said lien is recorded in volume No. "2," pages 437 & 438, of the record of mechanics' lien- in the recorder's office of Ottawa county, Ohio.

No part of said indebtedness, neither principal or interest, has been paid.

There is now due and unpaid to this defendant upon said indebted-

ness the sum of $338.11, with 6 % interest thereon from Sept. 7th, 1892, and which is the first, best, and prior lien upon all of the real estate aforesaid described by reason of the mechanics' lien above set forth.

Wherefore this defendant asks that an account may be taken of all the facts aforesaid averred; that all the right of the parties to this proceeding may be ascertained and determined by the court; that said real estate may be ordered sold for the payment of the claim aforesaid, and for such orders in the premises as are right and proper.

H. B. MAGRUDER,
Att'y for the Bodifield Belting Co.

PRATT & WILSON, *Of Counsel.*

83 THE STATE OF OHIO, } ss:
Ottawa Co., }

I, H. B. Magruder, of lawful age, being duly sworn, upon oath depose and say that I am the attorney for the Bodifield Belting Co., a corporation organized and existing under the laws of the State of Ohio, and that none of the officers or agents of said corporation are present to verify this affidavit (and for that reason affiant verifies the same), and that the matters and facts stated in the foregoing answer and cross-petition are true, as I believe.

H. B. MAGRUDER.

Sworn to and subscribed before me and in my presence this 1st day of April, 1893.

CHAS. C. STARR,
Notary Public. [SEAL.]

(Endorsement:) No. 1087. The Electrical Supply Co. *vs.* The Put-in-Bay Water Works, Light & Railway Co. Answer & cross-petition of The Bodifield Belting Co. Filed April 7, 1893. Irvin Belford, clerk. Pratt & Wilson & H. B. Magruder, att'y for Bodifield Belting Co.

84 *Mandate from Court of Appeals. Filed October* 21, 1893.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Ohio, Greeting:

Whereas, lately in the circuit court of the United States for the northern district of Ohio, before you, or some of you, in a cause between The Electrical Supply Company, complainant, and The
85 Industrial and Mining Guaranty Company *et al.*, respondents, wherein the decree entered in said cause in said court is as follows, viz:

"This day this cause came on to be heard upon the motion of the defendant, The Put-in-Bay Water Works, Light and Railway Company, to discharge the receiver heretofore appointed herein, and to modify the order to said receiver to issue certifiates of indebtedness, and the motion of the defendant, The Industrial and Mining Guaranty Company, for a dissolution of the injunction heretofore granted in this action, and the court having heard the evidence and the arguments of counsel, and now being fully advised in the premises, does overrule each and all motions.

And it appearing to the court that the certain one hundred and twenty-five (125) first-mortgage bonds of the defendant, The Put-in-Bay Water Works, Light and Railway Company, in dispute in this —, and one hundred thousand dollars ($100,000) of the capital stock of said water works, light and railway company, also in dispute herein, are in the possession of and controlled by the defendant, The Industrial Mining and Guaranty Company, and by the defendants John P. Carrothers and H. H. Warner; and it further appearing to the court that the rights, interests and equities of all parties interested in said bonds and stock, can be better and more certainly preserved if said bonds and stocks are in the possession and under the control of the court; it is therefore ordered that said defendants, The Industrial *and* Mining and Guaranty Company, John P. Carrothers and H. H. Warner, deliver said bonds and stock to the custody of the clerk of this court on or before the fifth day of January, 1893, and that the same be retained in the custody of the said clerk for the care and preservation of same, and for the purpose of preserving the interests of all parties therein, as may be determined upon the further hearing of this suit.

And, on motion to the court and for good cause shown, it is ordered that this cause and all questions herein be, and the same *is*
86 hereby referred to Irvin Belford, who is hereby appointed a special master commissioner for that purpose, who shall forthwith, upon being duly qualified, proceed to take the testimony offered by the parties, in writing, and report the same to the court, with his conclusions on the law and facts involved in the issue, without unnecessary delay," as by the inspection of the transcript of the record of said circuit court, which was brought into the United States circuit court of appeals for the sixth circuit by virtue of an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord, one thousand eight hundred and ninety-two, the said cause came on to be heard before the said United States circuit court of appeals for the sixth circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here, ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby reversed and injunction dissolved.

And it is further ordered that the appellant recover of the appellees, its costs herein expended in the sum of $254.00 and execution is awarded.

And said cause is hereby remanded to the said circuit court with directions for further proceedings in conformity with the opinion of this court.

JUNE 22D, A. D. 1893.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord, one thousand eight hundred and ninety-three.

87 *Costs of Appellant.*

Clerk	$24 60
Printing record	209 40
Attorney	20 00
	$254 00

[SEAL.]

WALTER S. HARSHA,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Endorsement:) 1087. United States circuit court of appeals for the sixth circuit. No. 98. October term, 1892. The Industrial & Mining Guaranty Co. *vs.* The Electrical Supply Co. Mandate. Filed Oct. 21, 1893. Irvin Belford, clerk.

(The following is a certified copy of the opinion referred to in said mandate:)

88 United States Circuit Court of Appeals for the Sixth Circuit.
In Equity.

Filed Sep. 20, 18—.

THE INDUSTRIAL AND MINING GUARANTEE COMPANY, Appellant,
vs.
THE ELECTRICAL SUPPLY COMPANY ET AL., Appellee. } No. 98.

Appeal from the circuit court of the United States for northern district of Ohio, western division.

Before Taft and Lurton, circuit judges, and Swan, district judge.

This appeal was taken under section seven of the act of March 3, 1891, establishing circuit courts of appeals, and enacting, "That where upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken under the provisions of this act, and an appeal may be taken from such interlocutory order or decree grant-

ing or continuing such injunction to the circuit court of appeals." The interlocutory order or decree complained of issued upon the cross-bill hereinafter mentioned, and continued an injunction granted September 10, 1892, without notice, restraining the appellant, H. H. Warner, and John P. Carrothers, during the pendency of the suit,

from selling, negotiating, or otherwise disposing of any or
89 all of the bonds of the Put-in-Bay Water Works Light & Railway Company, then in control of said defendants, and received by them under a certain agreement specified in the order.

The material facts presented by the record are as follows: The original bill in the cause was filed by the Electrical Supply Company, a Connecticut corporation, against the Put-in-Bay Water Works, Light & Railway Company, an Ohio corporation, James K. Tillotson, a citizen of Ohio, John P. Carrothers, a citizen of New York, the Industrial & Mining Guarantee Company, a New York corporation, H. H. Warner, a citizen of New York, and others. The relief ostensibly sought was the enforcement of an alleged mechanics' lien for the sum of $2,787.04, for supplies and materials furnished by complainant under a contract with the railway company and used by the latter, as the bill alleges, in the construction of its lighting apparatus and railway upon the following-described premises, viz: "The power-house building, situated on lots 471, 472, 473, 474 and 475, in Victory Park addition of Put-in-Bay island, and on and along poles, ties, track and other structures of the said defendant upon Put-in-Bay or South Bass island, Ottawa county, Ohio, all of which premises are the property of said defendant." To the bill is attached an itemized and verified statement of the supplies and materials for which the lien is asserted, a copy of which was filed with the recorder of Ottawa county, September 7, 1892. The bill avers that the defendants named, other than the railway company, claimed to have some interest in the premises upon which the lien is asserted, and prays that they may be required to appear and set up such claim or interest as they may have. It further prayed an accounting with the principal defendant, that a lien be decreed on its property for the

sum found due, and for a sale of the property. This bill was
90 signed by L. G. Richardson in his own name as solicitor for plaintiff. He also verified it on the 9th of September, 1892. On that day a subpœna was issued thereon, returnable on the first Monday in November, with a memorandum or rule endorsed requiring defendants to enter their appearance in the cause on or before the first Monday of October. No service of the subpœna was had upon either appellant, Warner or the Railway *Company* Equipment Company. It was served September 10th upon all the other defendants. On the same day Tillotson filed his answer and a cross-bill against the codefendants, the appellant, H. H. Warner, and John P. Carrothers, setting forth that he had procured the incorporation of the principal defendant, The Put-in-Bay Water Works, Light & Railway Company, to construct and operate water works, lighting apparatus, and an electric railway on South Bass island, with a capital stock of $150,000, in shares of $100 each, of which the

corporation retained all but 150 shares taken by Tillotson, and five shares necessarily distributed among a sufficient number of persons to organize the corporation and fill the offices required by the statutes of Ohio, and that he (Tillotson) and said corporation were in effect one person and identical; that to procure the means to construct the water works, light works and railway, he had the corporation issue 125 bonds of $1,000 each, dated July 16, 1892, secured by a first mortgage on all the real and personal property of the corporation on South Bass island, which mortgage ran to the Atlantic Trust Company, trustee; that on July 1, 1891, he contracted with the corporation to convey to it the right of way and property necessary for the construction of its railway, and to construct thereon a single-track electric railway and power-house, and all other structures and machinery necessary for the completion of the water works,
91 electric works and railway to be built by said corporation, for which the company was to pay him the remaining 1,345 shares of its stock, and the 125 bonds of $1,000 each, which were to be delivered as Tillotson might call for them if he should need them for the construction of a plant. The bonds were delivered to him, as agreed, but he failed to raise the money on them required for his contract; that he subsequently was induced by Carrothers to place the bonds with the appellant Warner for negotiation under a contract dated June 25, 1892, whereby they were to negotiate the securities, to pay a certain claim of the Central Thompson-Houston Company, amounting to $23,500, to advance to Tillotson $15,000 in three sight drafts, and to pay him July 20, 1892, $10,000, and the same amount every fifteen days thereafter until the total sum paid, inclusive of the Central Thomson-Houston Company's claim, and the advance of $15,000 should amount to $118,750. The contract also provided that the $100,000 of capital stock of the Put-in-Bay Water Works, Light & Railway Company "becomes and is the absolute property of the said party of the second part."

The charge is that Carrothers, Warner and the Industrial & Mining Guarantee Company wholly failed to carry out said contract, and to negotiate or sell any of the bonds, or to account for the same in any manner, and have failed to pay any of the moneys except the drafts for $15,000, and that they refuse to account for or return the bonds and stock to Tillotson, who is the owner and entitled to the possession thereof. Alleging that Carrothers and Warner will sell, negotiate or make way with the bonds and stock and their proceeds, and that Carrothers is a man of no pecuniary responsibility, and that the road has not yet been completed by Tillotson, because of the default of the appellant Warner and Carrothers, and that such default "is a continuing damage to him
92 (Tillotson), and is causing him irreparable injury, and will so continue to do unless said defendants are restrained by the order of this court," the answer and cross-bill prays an order against the appellant Warner and Carrothers, restraining them from negotiating any of the said bonds or stock, and a perpetual injunction to the same end; also the appointment of a receiver to take charge of the railway property of which Carrothers had taken possession, with

authority to the receiver to care for and operate the same under the order of the court in the interest of all concerned, and that if plaintiff is found to have a lien and a sale therefor be ordered, that the rights of Tillotson in said bonds and stock may be fully protected. The record shows that July 25, 1892, after the transfer of the stock in question to appellant, defendant Carrothers was, with Tillotson's consent, duly elected president of the railway company and a new board of directors chosen, and that Tillotson was on that date displaced as vice-president and general manager of the company; that Tillotson, claiming that appellant Warner and Carrothers had not fulfilled their agreement for the negotiation of the bonds of the company, refused to surrender possession of the road to Carrothers and the new directorate, or to permit them to operate, and he held possession thereof until September 3d; then the railroad company obtained possession thereof, except the books, papers and certain personal property secreted by Tillotson by virtue of a writ of replevin. It also appears without contradiction that upon the same ground, after the railway company had thus obtained possession of its road, Tillotson secreted the motor cranks of its cars, the pins used thereon connecting the same with the electric current, stopped the pump which supplied the water necessary to furnish power, and otherwise sought to prevent the operation of the railway, and the court of common pleas

93 of Ottawa county, upon the complaint of the company, enjoined Tillotson and his associates from interfering with the company's enjoyment of the possession and control of its property and business. The appellant, it is admitted, paid the $15,000 in drafts as stipulated in its contract, and has assumed and agreed to pay the $23,500 to the Central Thomson-Houston Company, mentioned in said contract, and the claim of the Westinghouse Electric Manufacturing Company, amounting to $20,016.66, which was a lien upon the property, making about $59,000 in all of payments made and obligations incurred by appellant, but it declined to make further payments under said contract until the road should be completed and the incumbrances thereon removed and a perfect title to the property be made, and appellant claims that by reason of the defective title of the railway company to its right of way and property, and the incumbrances thereon, appellant would be liable to the holders and owners of the bonds and stock disposed of by it. Appellant further claims that Tillotson represented the property of the railway company as clear and unincumbered, whereas it was largely involved. Although Tillotson denies making these representations, the sworn answer of the appellant and the affidavits of Carrothers, Warner, Earl and Footner positively affirm that he did, while Tillotson's denial is not corroborated. Appellant professes its readiness to fulfill its contract when the railroad is completed and the title to the property is perfect and unincumbered.

September 10, 1892, a temporary restraining order was issued on this answer and cross-bill as prayed, and L. S. Baumgartner was appointed receiver of the property, with authority to take possession thereof forthwith. Baumgartner gave bonds on the same day as such

receiver in the sum of $5,000. On the same day a subpœna re-
94 turnable on the first Monday of November was issued on this cross-bill, on which was endorsed a memorandum requiring defendants to enter their appearance on the first Monday of October, otherwise the cross-bill would be taken *pro confesso*. This subpœna was served upon Carrothers on the day of its issue, but was returned not found as to Warner and the appellant. The injunction complained of was issued on this cross-bill against appellant Warner and Carrothers. This was served on Carrothers on the same day, but as to the other defendants was returned September 16th, "not found." On the 15th of October following the receiver, stating that it would be necessary for him to store during the winter the four trailing cars and four motor cars of the railway company, and to care for its engines, dynamos, motors and other apparatus and machinery, and to erect a building and employ labor for that purpose, and to pay freight on said cars, filed his petition praying authority for that purpose to borrow money and issue interest-bearing receiver's certificates therefor in the sum of $5,000, as the needs of the property might demand. On the same day the issue of these certificates was authorized, and they were made a first lien on the railway. They have been issued and negotiated. Meanwhile, and on September 26th, the railway company, Carrothers and the appellant filed their answers to the cross-bill, denying every material allegation therein on which the claim to relief was predicated, and on October 29th the appellant, upon its answer and upon affidavits moved for a dissolution of the injunction, and the railway company moved for the discharge of the receiver. Both motions were founded on the ground that no notice had been given to those defendants of the application for an injunction for the appointment of a receiver, and upon the denial of the allegations of the cross-bill. These motions were denied
95 December 22, 1892, as was also a motion to modify the order appointing the receiver, and the order was made that day that appellant Carrothers and Warner deliver to the clerk of the court the 125 bonds and the $100,000 of stock of the Put-in-Bay Water Works, Light & Railway Company on or before January 5, 1893, to be by the clerk retained "for the care and preservation of the same, and for the purpose of preserving the interests of all parties therein, as may be determined upon the further hearing of this suit." On the same day, on the petition of the receiver, another issue of certificates amounting to $5,000 was authorized and made a first lien upon the property of the railroad, "the proceeds to be used in the care and preservation of the property." No service of process was ever made on defendant H. H. Warner, nor has his appearance been entered in the case. From the order of the court, made December 22, 1892, refusing to dissolve the injunction of September 10th and continuing the same in force, the Industrial & Mining Guarantee Company took and perfected this appeal. In support of the motion for the dissolution of the injunction and the discharge of the receiver, among other affidavits filed was that of Franklin S. Terry, the manager and attorney-in-fact, of the complainant, The Electrical Supply Company, who states that on or about September

6, 1892, the plaintiff corporation was approached by Mr. Richardson, who represented himself to be an attorney, and that he was "familiar with the affairs of the Put-in-Bay Water Works, Light & Railway Company," and advised the plaintiff corporation to file a lien against the Put-in-Bay Water Works, Light & Railway Company for the amount of its claim, $2,787.04, and to authorize him to commence a suit against the Put-in-Bay Water Works, Light & Railway Company in behalf of the Electrical Supply Company, and to bring suit in the Federal court asking fore-

96 closure of said lien and for an accounting. That the object of said suit was for the purpose of enabling the defendant, J. K. Tillotson, to file thereon his cross-petition for the purpose of having a receiver appointed. Relative to the amount and nature of the claim for which the complainant's bill was filed, Terry's affidavit further states: "That this plaintiff corporation was induced to include all sums due for material furnished for the use of the Hotel Victory Company, in our account against said railroad, that the material actually used in the construction of the Put-in-Bay Water Works, Light & Railway Company amounted to $861.23; that the balance of said material, to the amount of $1,925.81 was used inside said Hotel Victory. * * * That all of said material was ordered by said defendant, J. K. Tillotson, as vice-president of said corporation; that it was shipped to the said defendant corporation, and was charged on the books of the plaintiff corporation to the said Put-in-Bay Water Works, Light & Railway Company. This affiant further says that the allegation in its said petition, wherein the said plaintiff corporation is made to allege that it furnished said material to said J. K. Tillotson, either as an individual or contractor, is untrue, and was known to be untrue by said Tillotson and said attorney, L. G. Richardson. That said Richardson prepared the lien said plaintiff's petition filed in this action, and advised the plaintiff's representative, as its attorney, that said lien and said allegation of said petition were proper ones for this plaintiff to verify, and in accordance with his advice said petition was verified by the representative of this plaintiff corporation."

The statements of this affidavit are not controverted in any particular, nor is there of record here any attempt to explain or qualify them.

97 *The opinion of the court was delivered by SWAN, J.:

1. The appellant insists that as the temporary injunction was granted by the district judge September 10, 1892, at the June term, under the provisions of section 719 of the Revised Statutes of the United States, it could not "continue longer than to the circuit court next ensuing unless so ordered by the circuit court." That the next term was the December term, 1892, at which no order was made by

* NOTE BY THE CLERK.—The circuit judges regarding the question of the jurisdiction of the circuit court as the only point presented by the record necessary to be determined, limit their concurrence in this opinion to what is said on that point.

the circuit court continuing the injunction, and therefore it became inoperative. This contention is founded on a misconception of the powers of the district judge, and fails to give proper effect to his action in refusing to dissolve the injunction at the December term. The circuit court may be held by the associate justice allotted to the circuit, by either circuit judge, by the district judge, or by any two of these. This is the express provision of the statute. (U. S. Rev. Stats., sec. 609; Ins. Co. *vs.* Dunham, 11 Wall., 22; Gray *vs.* Chicago, etc., R. R. Co., Woolworth, 63; Goodyear Co. *vs.* Fulsom, 3 F. R., 509; Robinson *vs.* Satterlee, 3 Saw., 134, 140.) The district judge holding the circuit court has all the authority conferred by law upon either of the judges empowered to hold that court. His action, therefore, while holding the circuit court in refusing to dissolve the injunction granted by himself at the previous term was as effectual to continue it in force as if the court had been held by a full bench. (Parker *vs.* The Judges, 12 Wheaton, 561.) This objection to the injuncion therefore fails.

2. A more serious objection, however, is that the injunction was granted without notice, in violation of general equity rule 55,
98 which declares that "special injunctions shall be grantable upon due notice to the other party by the court in term, or by a judge thereof in vacation after a hearing which may be *ex parte* if the adverse party does not appear at the time and place ordered." This rule was evidently founded on section 5 of the judiciary act of 1793 (1 St. at L., p. 334), forbidding the granting of a writ of injunction, "in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same." It is held in Yuengling *vs.* Johnson (1 Hughes, 607, 610) that the omission of this clause from the Revised Statutes operated to repeal it by the provision of Revised Statutes, section 5596, and that it was also impliedly repealed by section 7 of the act of June 1, 1872. (17 Stats. L., 197.) Section 7 above referred to stands as section 718 of the Revised Statutes, and reads as follows: "Whenever notice is given of a motion for an injunction out of a circuit or district court, the judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion, and such order may be granted with or without security in the discretion of a court or judge." While this provision obviously enlarges the power of the court, it certainly preserves the principle of the repealed act of 1793, and of general equity rule 55. The issue of a restraining order, which may be granted *ex parte*, is by the express language of this section made dependent upon the existence of two conditions—the giving of notice of a motion for an injunction, and an apparent danger of irreparable injury from delay. The first of these conditions is not met by the fact that the cross-bill prays an injunction as ancillary to the relief sought, but notice of a motion for that remedy must have been given
or be served simultaneously with the notice of motion for an
99 injunction. No such motion was made or notice given in this case. Whether the cross-bill makes a case of "irreparable injury from delay" within the statute, may well be doubted, for

upon the facts stated in the cross-bill, Tillotson has a legal right of action for any breach of the agreement made with appellant, and his cross-bill shows no impediment to the recovery of damages at law, nor any reason why such damages will not afford him full redress. (Buzard *vs.* Houston, 119 U. S., 347.) The fair and necessary implication from the language of section 718, considered in connection with the practice which obtains in the Federal courts, and that of the high court of chancery of England on which it is founded, is that, as before the statute, so now, the extraordinary remedy of injunction—including restraining orders—requires for its exercise a clear case of threatened injury reasonably to be apprehended, and which can only be thus averted, and for the redress of which the recovery of damages would not give adequate compensation. The only purpose of such an order is to preserve the status of litigants for such time as may be necessary according to the practice of the court, to bring the matter in issue to a hearing upon motion in the regular way, in order that both sides may be heard. When such a hearing has been had the court may grant or refuse the injunction. The fact that the statute makes the two conditions mentioned indispensable to the granting of a restraining order for a limited time, shows indisputably that it was never intended to clothe the courts with power to enjoin a defendant indefinitely or embarrass his business *ex parte*, and without notice, except where notice of the application would itself be productive of the mischief apprehended by inducing the defendant to accelerate the completion of the act sought to be enjoined before process could be served. No such case appears in the cross-bill, and both the restraining
100 order and the injunction of September 10th were therefore improvidently granted. (Foster's Fed. Prac., sec. 231.) The refusal to dissolve the injunction was also erroneous. Upon the case made by the cross-bill, the stock of the railway company by the express terms of the contract became the absolute property of appellant. The equities of the cross-bill are denied by the answers of the Put-in-Bay Water Works, Light & Railway Company, John P. Carrothers, and the appellant, and by the affidavits of Earl, Footner, Baruch and Warner. Opposed to these are the affidavits of Tillotson and L. G. Richardson, the latter the solicitor of record for complainant, who also had acted as Tillotson's counsel up to the time of the filing of the bill. The affidavit of Mr. Lewis, also one of Tillotson's counsel, fails to confirm Tillotson's denial of the representations as to the title of the property. Without detailing the matters alleged in these affidavits, it is sufficient to say that, conceding to each affiant equal credibility and means of knowledge, the weight of evidence is clearly in favor of the appellant. The burden of proof was upon Tillotson to sustain the allegations of irreparable injury upon which the restraining order and injunction were granted. This he failed to do, and the injunction should have been dissolved, even if there had been only an equipo-se of testimony.

3. The important question in the case is whether the amount involved is within the jurisdiction of the court, and whether for reasons hereinafter stated the court ought not to have dismissed the cross-

bill *sua sponte*. The affidavit of Terry positively avers that the material actually used in the construction of the Put-in-Bay Water Works, Light & Railway Company amounted to but $861.23, and that the balance of the material, amounting to $1,925.81, was used inside the Hotel Victory. The act of March 3, 1887, confers
101 upon circuit courts of the United States original cognizance of all suits of a civil nature at common law, or in equity, in which there shall be a controversy between the citizens of different States where the matter in dispute exceeds, exclusively of interest and costs, the sum or value of $2,000. The statement in Terry's affidavit, just referred to, is not denied, and there is nothing on the record to discredit its admission that the material for which the lien is asserted amounted in value to but $861.23. Its effect, therefore, is clearly to deprive this court of jurisdiction of complainant's claim. (Williams *vs.* Mottawa, 104 U. S., 209; Bernard Township *vs.* Stebels, 109 U. S., 341.) It is urged in reply to this, however, that the Put-in-Bay Water Works, Light & Railway Company is organized not only to build a railroad, but an electric plant and a water-works plant, and that the property of the company subject to a lien is described in the railroad lien law of Ohio (Revised Statutes of Ohio, section 3208); and the general mechanics' lien law of that State (Revised Statutes of Ohio, amended section 3184); that the plant of the company consists not only of all of its railroad, but all the appliances in the hotel for the purpose of lighting the hotel and grounds, and this consisted not only of a railroad, but of an electric-light plant, which it put in the hotel, grounds and buildings, under contract with the hotel, for the purpose of lighting.

By section 3208 of the Revised Statutes of Ohio it is provided that "a person who performs labor or furnishes materials for or in construction of any railroad, depot buildings, water tanks, or any part thereof, to a contractor or subcontractor * * * shall have a lien for the payment of the same upon such railroad * * *." In order to perfect such lien the person furnishing the materials shall within forty days after he ceased furnishing the same, file
102 with the recorder of the county where the materials were furnished, an affidavit containing an itemized statement of the kind and amount of materials furnished, the time when the contractor or subcontractor for whom, and the section and place where on the line of the road, the materials were furnished, and the amounts due therefor after crediting all payments and set-offs. Claimant must also, within ten days after filing such affidavit, serve a notice on the secretary or other officer or representative of the railway company, by delivering or leaving a copy thereof at his usual place of residence, or of doing business, or, if that cannot be served in the county, the recorder may serve the same by mail. This notice must state the fact of filing the affidavit, the county wherein filed, the amount claimed, and whether for labor, materials or board furnished, and the contractor or subcontractor for whom rendered. Its further provision is that "any person failing to file his affidavit aforesaid, and serving the notice aforesaid within the time prescribed, shall be deemed and held to have waived all claims under this sec.

tion against the railroad company." This statute gives a lien upon the railroad only for materials furnished a contractor or subcontractor, or in constructing of such "railroad, depot buildings and water tanks, or any part thereof." For whatever other structures materials may be furnished no lien is given under this act. The act of April 3, 1884 (vol. 81, Ohio Statutes), declaratory of the meaning of section 3208, above cited, enlarges the list of those entitled to a lien by enacting "that the true intent and meaning" of those sections is that "any person or persons who perform labor or furnish material or boarding under contract, express or implied, with such railroad company, or any of its authorized agents, for the construction of such railroad, or any part thereof, is entitled to a lien for the
163 payment of the same upon such railroad, as provided in section 3108 of the above-recited act." The only effect and purpose of this latter act was to give a lien under section 3208 as well as to persons furnishing materials directly to or performing labor under contract with a railroad company, as to those who dealt with contractors or subcontractors who were protected by section 3208. Neither act, however, purports to give a lien upon a railroad for anything not used in its construction as a railroad, or that of its depot buildings or water tanks. Whatever materials complainant furnished to, or were used by the railroad company in providing the Hotel Victory with an electric-lighting plant are clearly neither within the intent nor the language of section 3208, which confines the lien to material furnished for the construction of the railroad, depot buildings and water tanks. If section 3208, as amended in 1883 (vol. 80, Laws Ohio, p. 99,) was still in force when the affidavit was filed September 7, 1892, (Ex. D of the original bill) and the last of the materials were furnished within forty days before that date, of which there is no evidence in the record, as Terry's affidavit fails to designate the nature of the materials furnished to the railroad company and the dates when the same were furnished—as distinguished from those used inside the Hotel Victory—it may be that the affidavit of lien, Exhibit D, was seasonably filed. But there is nothing to show when complainant ceased to furnish material for the construction of the road, or that notice of this affidavit was given, as required by the statute.

Coming now to the contention that the validity of the lien may be rested upon section 3184 of the Revised Statutes of Ohio, we find that that section, though amended by the act of April 15, 1889 (vol. 86, Laws of Ohio, 373), has not been changed in any particular material to the inquiry here. As it stood prior to this amend-
164 ment in Williams' Revised Statutes of Ohio (pp. 643, 644), it was construed by the supreme court of that State in Rutherford *vs.* The Cincinnati, etc., R. R. Co. (35 Ohio St., 359), and held not to confer a lien upon a railroad. This is also the construction given by the Supreme Court of the United States to the mechanics' lien law of North Carolina, the language of which is even broader than that of the Ohio statute. (Buncombe Co. *vs.* Tommey, 115 U. S., 122.) With reference to the argument that it confers a lien upon the electric-lighting plant, it is only necessary to quote its

language so far as material to repel that contention. It enacts that, "A person who performs labor or furnishes machinery or material * * * for erecting, altering, repairing, or removing a house, mill, manufactory, or any furnace, furnish material therein, or other building, appurtenance, factory, bridge, or other structure * * * by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same upon * * * such house, mill, manufactory, or other building or appurtenance, factory, bridge, or other structure * * * and upon the material and machinery so furnished, and upon the interest of the owner in the lot or land upon which the same may stand, or to which it may be removed." It would be an exceedingly strained construction of this language to hold that the material for which the lien is claimed was furnished for "erecting, altering, repairing, or removing" a house or other structure mentioned in the statute, and that, too, in the face of the averment of the bill that the materials "were used in the construction of the lighting apparatus and railway of the defendant," and in a power-house already erected.

The lien here prayed is upon the railroad as an entirety, and that is the theory of the bill. The premises and property against
105 which it is asserted is the railroad, its motive and lighting apparatus and appliances, poles, ties, track and other structure, including that part thereof located in the power-house, the cost of which is not stated. The language of the section, and the considerations stated in Rutherford *vs.* The Cincinnati, etc., R. R. Co., cited *supra*, forbid the application of this statute. It results, therefore, from the concession of the complainant limiting its claim to the sum of $861.04 that the circuit court had no jurisdiction of the subject-matter, and should have dismissed the bill.

This conclusion equally disposes of Tillotson's cross-bill, so called. If it be a cross-bill, it is a mere auxiliary and a dependency of the original, and the dissolution of the original bill necessitates the same disposition of its incident. (Cross *vs.* De Valle, 1 Wall., 1, 14; Dows *vs.* Chicago, 11 Wall., 108, 112.) But it would be a misnomer to call this bill a cross-bill, beyond the fact that it names the complainant as a party, it has but a nominal relation to the subject-matter of the original bill; it tenders no defense to its averments, and makes no issue with complainant respecting the matters charged therein, but seeks to introduce a new controversy, not at all necessary to be decided in order to have a final decree on the case presented by the bill. In Ayres *vs.* Crawford, 17 How., 591, the original bill of complaint sought to enforce an alleged title to several tracts of land claimed by different defendants. Two of the defendants, after answering, filed a cross-bill against complainant, and the other defendants setting forth the substance of the original bill, and then charging that they had obtained a title to the several tracts in controversy, or portions of them, long prior to the title claimed by their codefendants, prayed that their cross-bill might be heard at the same time with the original bill, and that any claim that complainant might set up to the several tracts of land
106 claimed by them in the cross-bill, might be set aside and annulled. Of this pleading the court says: "As it respects

the cross-bill, it may be proper to observe that the matter sought to be brought into the controversy between the complainants in that and the codefendants, do not seem to have any connection with the matters in controversy with the complainant in the original bill, nor is it perceived that he has any interest or concern in that controversy. These two complainants in the cross-bill set up a title to the lands in dispute which they insist is paramount to that of their codefendants, and seek to obtain a decree to that effect and to have the possession delivered to them. This is a litigation exclusively between these parties, and with which the complainant in the original bill should not be embarrassed or the record encumbered. * * * It (the cross-bill) should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original and independent suit." In the light of this authority, the so-called cross-bill in this cause is an original bill brought by Tillotson, a citizen of Ohio, against Carrothers and the railway company, also citizens of Ohio, and appellant Warner, citizens of New York. Of this suit the Federal court has no jurisdiction, because of the citizenship of the parties. Its plain purpose was to enable Tillotson to litigate in that court his differences with some of his codefendants, which no more affected the litigation of the principal suit than would any other controversy between them as to lands, stocks or other property. It was therefore an original and not a cross cause. (Rubber Co. *vs.* Goodyear, 9 Wall., 809, 810.) That this was its object is evidenced not only by the undisputed affidavit of Terry that Richardson procured complainant to file its bill in the Federal court, and

107 informed him that the object of the original suit was for the purpose of enabling Tillotson to file thereon a cross-petition for the purpose of having a receiver appointed, but also by the promptitude with which Tillotson filed his so-called cross-bill—the next day after the filing of the original bill. Richardson makes two affidavits appearing in the record. In neither does he contradict any statement contained in the affidavit of Terry, nor does Tillotson. Tillotson must, therefore, be regarded as confessing the truth of its statements, particularly that which charges that the material used in the construction of the railway amounted in value to but $861.23. If Tillotson and his attorney knew that fact, and the former must have known it, as he ordered and used the material, the original suit which they induced complainant to bring for their own ends, was flagrantly collusive—a mere sham and pretense to create "a fictitious ground of Federal jurisdiction." And under the act of March 3, 1875, it was the duty of the court to have dismissed it as not really and substantially involving a dispute, or controversy properly within its jurisdiction, and because the parties were improperly and collusively made and joined for the purpose of creating a case cognizable under the act. (Hawes *vs.* Oakland, 106 U. S., 541; Farmington *vs.* Pillsbury, 114 U. S., 138; Little *vs.* Giles, 118 U. S., 596; Robinson *vs.* Anderson, 121 U. S., 532.) As has been said in Bernard Township *vs.* Stebbins (109 U. S., 353), "In the matter of the jurisdiction of the Federal courts the discrimination between

suits between citizens of the same State, and suits between citizens of different States, as established by the Constitution and laws of the United States, and it has been the constant effort of Congress and of this court to prevent that discrimination from being evaded by bringing into the Federal court controversies between citizens of the same State."

108 That the complainant was culpable in lending the use of his name to promote Tillotson's fraud upon the jurisdiction of the court, with knowledge of his purpose, and was responsible for the negligence—to use no stronger term—of its assistant manager in making oath to the amount of materials used in the construction of the railroad, is undeniable. But this may perhaps be palliated in some degree by the fact that it was done under the advice of its attorney, who, it was known, however, was acting in Tillotson's interest. The agreement, nevertheless, was "to obtain an object forbidden by law," and therefore fills the definition of collusion, which, as is said in Jessop *vs.* Jessop (2 Swab. & T., 301), "may be among other things by keeping back evidence of what would be a good answer or by agreeing to set up a false case." The real and responsible offenders against the act of Congress are Tillotson and Richardson, who devised and procured the scheme apparently for the purpose of avoiding the effect of the action of replevin and of the suit in equity in the State courts, in the latter of which, as the record shows, Tillotson was still under injunction from interfering with the operation of the railroad, to the control of which he asserted substantially the same rights as those pleaded in his cross-bill here. That litigation appears to be still pending and constitutes an insuperable obstacle to the jurisdiction of the circuit court of the United States to appoint a receiver of the railroad or otherwise interfere with the possession required by the action of replevin, or with the effect of the injunction, or in any manner to nullify its action in the equitable suit. Every issue presented by the cross-bill as to the respective rights of Tillotson, appellant Carrothers and Warner, was open to contest, in either the action of replevin or the suit in equity in the State court, if not in both. (Taylor *vs.*

109 Carryl, 20 How., 594; Buck *vs.* Colbath, 3 Wall., 341; Domestic & Foreign Soc. *vs.* Hinman, 13 F. R., 161.) For these reasons it is obvious that the circuit court had no jurisdiction of this suit or its dependency, the cross-bill, and its order awarding the injunction, and its refusal to dissolve the same was erroneous and must be vacated and set aside, and the original and cross bills should be dismissed without prejudice, and with cost of the circuit court and of this court to appellant, against Tillotson on the cross-bill, and against complainant on the original bill.

While it is the general rule that where a cause is dismissed for want of jurisdiction, costs are not awarded to the prevailing party, nevertheless, by section 5 of the act of March 3, 1875 (18 U. S. Stats. at L., 472), the circuit court is required, in cases coming within that section improperly brought in or removed to that court, "to make such order as to costs as shall be just." This was manifestly designed to avoid the application of the general rule above referred

to. (Mansfield, etc., R. R. Co. *vs.* Swan, 112 U. S., 387, 388.) As this court has jurisdiction of the order appealed from, appellant is also entitled to costs of this court under the authority last cited.

With reference to the receiver's certificates, issued under the order of the circuit court, so far as the same have been negotiated and their proceeds applied to the preservation and protection of the property pending this litigation, the discharge of liens thereon and indebtedness owing by the Put-in-Bay Company for labor which had accrued before this suit, all just and reasonable expenditures should be allowed to the receiver as made in the common interest of all concerned in the property. An order should be entered in the cause requiring the receiver to render a full and detailed account of his expenditures, the purposes for which, the persons to whom, and the dates when the same were made, and referring it to
110 a master to examine and report upon said accountant. The appellant and the Put-in-Bay Water Works, Light & Railway Company, Warner and Carrothers, to be notified by the master of the times and places of examination, and to be permitted to appear and submit testimony, and cross-examine the witnesses adduced by the receiver. The compensation of the receiver should be borne by Tillotson, at whose instance he was appointed, and would seem to be recoverable from the obligers of the injunction bond.

The decree of the circuit court containing the injunction is therefore reversed, and a decree will be entered in accordance with this opinion, dismissing the original and cross bills for want of jurisdiction, with costs, as herein directed.

TAFT, *Circuit Judge:*

The order appealed from should be reversed and the injunction dissolved. But $861.23 of the claim for $2,787.04, set up in the complainant's bill, was for articles furnished and work done in the construction of the electric railway of the defendant railway company. The remainder of the claim was for material furnished and work done in and upon the Hotel Victory, which did not belong to the railway company. These facts are not now denied. It follows that, under the statutes of Ohio, cited by Judge Swan, complainant was entitled to a lien upon the railway only for $861.23. The averment that more than $2,000 in work and material was furnished in the construction of the railway was falsely made, and for the conclusive purpose of invoking the equitable jurisdiction of the Federal court. The whole object of the bill was to enable Tillotson, a defendant, a citizen of Ohio, to file a cross-bill against codefendants named in the bill, citizens of Ohio and other States, and thus obtain in the Federal court an adjudication of a controversy ordinarily cognizable
111 only in the State courts. It was clearly a case where the jurisdiction of the Federal court had been collusively sought. This appeared at the hearing upon the motion to continue the injunction, and should have led the circuit court to dissolve the injunction. It may be that the jurisdictional question involved should be regularly raised upon the record by plea or otherwise. We are not concerned with that question of procedure here. The issue be-

fore the circuit court was whether an order enjoining the defendants from selling certain bonds should be continued, pending the trial of issues raised upon bill and answer and cross-bill and answer. The circuit court was made to know that its equitable jurisdiction had been collusively and improperly invoked. It then became its duty not to continue the injunction. This is the sole ground upon which I vote for a reversal of the order appealed from.

I do not see how the question of the preliminaries necessary to the issue *ex parte* of an in-unction has any place in this discussion. The order appealed from was one continuing an injunction. The appellant and Carruthers, the only two defendants against whom the injunction had any operation, had full notice of the hearing upon the motion to continue the injunction, and were present, by attorneys. It is immaterial whether the original order of injunction was issued without proper notice or not, if, upon the merits, the injunction was a proper, equitable remedy to preserve the *status quo*. To hold otherwise would be to make substantial justice yield to a shadowy technicality.

Nor can I agree that the cross-bill of Tillotson was not germane to the action as brought in the bill. The bill prayed for a foreclosure of the lien, a sale of the railway, and, as incident and necessary to such reliefs, a marshalling of all other liens upon the prop-
112 erty and a distribution of the proceeds among the lienholders and others interested. It was proper for each defendant to set up his right in the property or its proceeds. Tillotson claimed a mortgage lien on the property to secure certain bonds, his title to which had been disputed by another codefendant. The complainant was entitled to have both claimants brought in, so that the property might be sold free from the lien of the claim in dispute between them. Being in court, their rights to the proceeds of the sale to be decreed under the prayer of the complainant must necessarily be determined before a distribution could be made, and this would, of course, involve the settlement of the entire dispute as to title between them.

I am not prepared to say that Tillotson's cross-bill did not on its face state a good case for equitable relief. It is not necessary now to decide the question.

We have only jurisdiction on this appeal to reverse the order of injunction. We have no power to direct a dismissal of the bill, or the vacation of an order appointing a receiver. Those are matters which, by the terms of section 7 of the court of appeals act, remain within the cognizance of the circuit court until a final decree is entered and appealed from. While I fully concur in the view that the circuit court, before dismissing the bill for want of jurisdiction, may require payment of the reasonable expenses incurred in the case, and preservation of the property taken within its custody, I do not think we can make any order on this appeal touching the matter. Our only action should be to reverse the order continuing the injunction, at the costs of the appellee.

LURTON, *Circuit Judge:*

I do not think it necessary to decide more than that the jurisdiction had been obtained by collusion, and the injunction should have been dissolved. The appeal gives this court jurisdiction to determine no other question. The cause should be remanded for further proceedings.

113 A true copy.
[SEAL.] WALTER S. HARSHA, *Clerk.*

Cincinnati, O., September 27, 1893.

114 U. S. Circuit Court, Northern Dist. of Ohio, Western Div'n.

THE ELECTRICAL SUPPLY CO.
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY CO. *et al.* } No. 1087.

Motion to Dismiss for Want of Jurisdiction.

It having appeared that the jurisdiction of this cause by this court was collusively obtained, the defendants, The Put-in-Bay Water Works, Light and Railway Company, The Industrial and Mining and Guaranty Company, and John P. Carrothers, now move the court to dismiss this cause for want of jurisdiction.

J. B. FORAKER,
E. W. TOLERTON,
BROWN & GEDDES,
Attorneys for Defendants Making Motion.

(Endorsement:) U. S. circuit ct., N. D. O., W. D. No. 1087. Electrical Supply Co. *v.* Put-in-Bay Water Works, Light and Railway Company *et al.* Motion to dismiss for want of jurisdiction. Filed Dec. 5, 1893. Irvin Belford, clerk. J. B. Foraker, Brown & Geddes, E. W. Tolerton, for motion.

December Term, A. D. 1893, to wit, December 14, 1893.

Present: Honorable Augustus J. Ricks, U. S. district judge.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY Company *et al.*, Defendants. } No. 1087.

It appearing to the court that the order heretofore entered overruling the motion of said defendants, The Put-in-Bay Water Works, Light & Railway Company and The Industrial & Mining Guaranty Company, to dissolve the injunction heretofore granted in this cause, has by the mandate of the circuit court of appeals been reversed, with directions that said injunction should be dissolved, it is therefore considered by the court that said motion be, and the same is

hereby, granted, and said injunction granted on the cross-bill of the said defendant, James K. Tillotson, be, and the same is hereby, dissolved at the costs of said defen-.

115 December Term, A. D. 1893, to wit, December 28, 1893.

Present: Honorable Augustus J. Ricks, U. S. district judge.

THE ELECTRICAL SUPPLY COMPANY, Complainant.
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, Defendants. } Decree.

This cause came on further to be heard on the mandate from the circuit court of appeals, and the opinion of said court, and the motion of the defendants to dismiss the same for want of jurisdiction, and was argued by counsel. Thereupon it was ordered that Irvin Belford, Esq., is hereby appointed a special master commissioner for the purpose of examining the accounts of the receiver heretofore appointed in this cause, with particular reference to the disposition made by the receiver of the proceeds of the receiver's certificates heretofore issued at such receiver's request. And it is ordered that said receiver shall forthwith render to said master a complete inventory of the property received by him, and a full and detailed account of his expenditures, the purposes for which, the persons to whom, and the dates when the same were made. That the said master shall thereupon cause the said receiver to appear before him at a hearing to be appointed for such purpose.

That said receiver shall render to said master a full and detailed account of his expenditures and the purposes for which, the persons to whom, and the dates when same were made. And said master is directed to notify The Put-in-Bay Water Works, Light and Railway Company, The Industrial and Mining Guaranty Company,
116 and John P. Carrothers, defendants herein, of the times and places of such hearing, and that said defendants shall be permitted to appear before him and submit testimony and to cross-examine the witnesses adduced by the receiver for the purpose of determining the disposition of the proceeds of receiver's certificates and the disposition of the revenue of the property that has passed through said receiver's hands.

It is further ordered that said master report the reasonable compensation to which the receiver is entitled for his services as such.

It is further ordered that the master designated herein shall cause the defendants, The Put-in-Bay Water Works, Light and Railway Company, The Industrial and Mining Guaranty Company and John P. Carrothers, to file with him, a true and correct statement of all their expenses arising from this action, and the said master shall within, the time herein fixed for his report, take testimony for the purpose of establishing the actual amount of damage sustained by said defendants, in addition to the expenses of the aforesaid defendants, and the expenses found by said master to have accrued to said defendants, or any of them, and such reasonable and fair damages

as they may have sustained by reason of the said cross-petitioner's action herein shall be reported to this court, together with the report of said master upon the said receiver's accounts and expenditures.

It is further ordered that the master proceed with all convenient speed, and that he report his findings, together with the evidence, to the court, within twenty days from the date of entry hereof.

117 *Report of Master on Disposition of Proceeds of Certificates and Awarding Damages, Superseded by Harris' Report, Filed March 31, 1894.*

Circuit Court of the United States, Northern Dist. of Ohio, West. Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, Defendants. } No. 1087.

To the Honorable Wm. H. Taft and Horace H. Lurton, judges of said court:

In pursuance of a decretal order made and entered in this cause and bearing date on the 22d day of December, A. D. 1893, at a regular term of this court held at the court-rooms in the city of Toledo, in the said district, by which it was referred to Irvin Belford, of Toledo, Ohio, as a special master commissioner for the purpose of examining the accounts of L. S. Baumgardner, receiver, heretofore appointed in said cause with particular reference to the disposition made by said receiver of the proceeds of the receiver's certificates heretofore issued at such receiver's request:

To report the reasonable compensation to which the receiver is entitled for his services.

To report the expenses incurred and the damages sustained by the Put-in-Bay Water Works, Light and Railway Company, the Industrial and Mining Guaranty Company, and John P. Carrothers, by reason of the action of James K. Tillotson, cross-petitioner herein, and to do and perform certain other things directed in said decree.

I, Irvin Belford, special master aforesaid, do respectfully report that I have proceeded to investigate the matters so referred

118 to me, and that pursuant to a summons duly issued, I have been attended by the parties interested in these matters embraced in this reference, to wit: The Put-in-Bay Water Works, Light and Railway Company, the Industrial and Mining Guaranty Company and John P. Carrothers and J. K. Tillotson, and their respective counsel, and have taken proofs upon the matter at issue and do report and find as follows, to wit:

In pursuance of said decretal order, an inventory of the property received by the receiver and a full and detailed account of his receipts and expenditures, together with a statement of unpaid bills outstanding January 1, 1894, and also a list of certified claims filed and remaining unpaid, were duly filed by said receiver.

And on the 2d day of February, A. D. 1894, said receiver appeared before me at hearing previously appointed, and of which due notice was given to all parties, and was duly examined and cross examined concerning his transactions, receipts and payments, and especially with reference to the disposition of the proceeds of receiver's certificates and the revenues of the property that *has* passed through his hands.

And I also caused the defendants, The Put-in-Bay Water Works, Light and Railway Company, The Industrial and Mining Guaranty Company, and John P. Carrothers, to file with me statements of their expenses arising from this action, and also took testimony relative thereto, and to the damages sustained by said defendants in addition to the expenses of said defendants.

The following I find to be a correct statement of the receipts and expenditures of said receiver, to wit:

Receipts.

From proceeds of receiver's certificates	$8,776 10
One ninety days' note	53 46
Earnings of railway	3,330 30
Other sources	71 04
	$12,230 90

419

Expenditures.

Construction	$2,905 05
Power-house	212 45
Track	85 28
Betterments	663 55
Operating expenses	3,138 98
Insurance	198 95
Care of property	910 89
Labor claims	3,326 43
Payment receiver's certificates No. 1, with interest	528 00
	$11,969 58
Cash on hand	261 32
	$12,230 90

I find that the reasonable compensation to which the receiver is entitled for his services as such is $2,200.00, twelve hundred dollars of which said sum is for his personal services and one thousand dollars for his attorney fees, paid to Doyle, Scott and Lewis.

The foregoing findings as to the report of such receiver and his compensation is made after hearing proofs relative thereto, and by agreement and consent of parties made by counsel at such hearing the same are to be approved and confirmed.

I find that the following expenses have been incurred by the defendant, The Industrial and Mining Guaranty Company in and

about their defense to the cross-bill of James K. Tillotson and the injunction proceedings incident thereto, to wit:

For attorney fees and expenses of J. B. Foraker, for which judgment has been rendered and attachment proceedings are pending in the court of common pleas of Lucas county, Ohio, to wit:

Amount of judgment	$5,153 83
Amount of costs	15 32
	$5,169 15

120 For attorney fees and expenses of Brown and Geddes, for which judgment has been rendered in the court of common pleas of Lucas county, Ohio, to wit:

Amount of judgment	$511 58
Cost of suit	15 55
	$527 13

To E. W. Tolerton for attorney's fees and expenses:

Attorney fees	$2,750 00
Expenses	348 95
	$3,098 95

$109.00 of said expenses are for costs pertaining to the appeal of the interlocutory order in this case.

Said expenses of the Industrial and Mining Guaranty Company aggregating the sum of $8,795.25.

The inventory of property in the hands of said receiver and the report of the receiver of receipts and expenditures and of unpaid bills, and of certified claims remaining unpaid, marked "Exhibit A" and "Exhibit B," are returned and filed herewith and made a part of this report.

The stenographer's report of testimony taken on said hearing is also returned and filed herewith.

Respectfully submitted.

IRVIN BELFORD,
Special Master.

March 31, 1894.

(Endorsement:) 1087. Electrical Supple Co. *vs.* Put-in-Bay Water Works, Light, & R'y Co. Report of Irvin Belford, special master. Filed Mar. 31, 1894. Irvin Belford, clerk.

121 *Conditional Dismissal. Filed June* 12, 1894.

June Term, A. D. 1894, to wit, June 12, 1894.

Present: Honorable Augustus J. Ricks, U. S. district judge.

THE ELECTRICAL SUPPLY COMPANY
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY *et al.*
No. 1087. Journal Entry.

This day this cause came on for further hearing upon the motion of the Industrial and Mining Guaranty Company, the Put-in-Bay Water Works, Light and Railway Company and John P. Carrothers to dismiss this cause for want of jurisdiction. And the court having heard the evidence, and the arguments of counsel, and being now fully advised in the premises, does grant said motion conditionally.

It is therefore ordered, adjudged and decreed that upon the payment into court of the amount due on the certificates issued by L. S. Baumgardner, heretofore appointed receiver herein, or the filing herein of said certificates duly paid and cancelled on or before the 30th day of June, 1894, and the payment to the clerk of this court of the costs in this case, including the compensation of the receiver, which is now taxed at the sum of $1,200.00, and the compensation of receiver's counsel, which is now taxed at the sum of $1,000.00, said cause be, and the same is hereby, dismissed.

And it being made to appear to the court that amounts due J. B. Foraker, Brown & Geddes, and E. W. Tolerton, as reported by the master heretofore appointed herein, have been fully paid and satisfied, it is ordered that the injunction bond heretofore filed
122 herein be cancelled, and that the parties to said bond be, and they are hereby, discharged from any liability thereon, and said bond may be withdrawn from the files.

(Endorsed:) O K.

J. B. FORAKER AND
CLARENCE BROWN,
For J. B. Carrothers and the Put-in-Bay W. W., L. & Ry.
J. K. TILLOTSON,
By L. G. RICHARDSON, *Doyle, Scott & Lewis.*
THE THOMPSON-HOUSTON CO.,
Doyle, Scott & Lewis.

Endorsed: O K.

Judge's Calendar, June Term, 1894.

Page 5, entry:

June 12.—"Conditionally dismissed, see journal entry."

June 16.—"Order June 12th not having been complied with, that part of order dismissed, case set aside unless money paid before day of sale." "Order to sell, see journal."

123 *Motion of Arbuckle, Ryan and Company to Cancel Certificates and Dismiss the Cause. Filed December 5, 1894.*

In the United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Plaintiff,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY Co., Defendants. } Motion.

To the honorable judge of the circuit court, northern district of Ohio, western division:

Now comes your orator, Arbuckle, Ryan and Company, and moves the court, and prays that an order be made by your honorable court to dismiss the above-mentioned cause in compliance with an order of your honorable court, heretofore made in this action, that said cause be dismissed when the receiver's certificates issued by the receiver, heretofore appointed in this cause by your honorable court, and which certificates were issued in accordance with the former orders of this court, were paid.

Your orator represents that said certificates have been paid in full but that the same have not been cancelled, as in good faith and equity they should have been.

Your orator represents that said certificates are now held by Walker P. Hall and James E. Hutton, who have heretofore neglected and refused, and still neglect and refuse, to bring the same into court to have them cancelled.

Wherefore, your orator prays that said Walker P. Hall and James E. Hutton may be ordered to produce said certificates in court and have the same cancelled, or that upon failure so to do that your honorable court find and decree that said certificates have
124 been paid and that an order of court stand for the cancellation of said certificates, and for all further and equitable relief in the premises.

PARKS & HAMILTON,
Attorneys for Arbuckle, Ryan & Company.

(Endorsement:) 1087. United States circuit court, northern district of Ohio, western division. Electrical Supply Company, plaintiffs, *vs.* The Put-in-Bay Water Works, Light & Railway Company *et al.*, defendants. Motion. Filed Dec. 5, 1894. Irvin Belford, clerk. Arbuckle, Ryan & Co., by Parks, Van Campen & Adelsberger, attorneys-at-law.

125 AUGUSTUS J. RICKS,
U. S. District Judge.

Decree by Judge Ricks Denying Motion of Arbuckle, Ryan & Co. to Dismiss Suit and Cancel Certificates. Filed March 1, 1895.

(Entered) Friday March 1, 1895.

THE ELECTRICAL SUPPLY COMPANY
v.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*
} In Equity. No. 1087. Entry.

This cause came on to be heard on the motion of Arbuckle, Ryan and Company to compel the holders of the receiver's certificates heretofore issued under the orders of this court herein to deliver them up to be cancelled and to dismiss said cause; the order to Walker P. Hall and James E. Hutton to show cause why said receiver's certificates should not be cancelled; the answer of Walker P. Hall to said citation to show cause; and the evidence and was
126 argued by counsel; and the court being fully advised in the premises, finds that the said Walker P. Hall purchased said receiver's certificates for full value and in good faith relying upon the orders of this court and is the present owner and holder thereof, that the same have not been paid nor has anything been paid to the said Walker P. Hall on account thereof and that they are still a first lien upon all of the property and franchises of the defendant company, The Put-in-Bay Water Works, Light and Railway Company, and that said cross-petitioners are not entitled to have said cause dismissed until said receiver's certificates and expenses and the costs of this cause are paid in full.

It is therefore ordered, adjudged and decreed that the order, heretofore entered in this cause, requiring the said Hall to produce said certificates for cancellation, and that said order should stand for a cancellation unless he should show cause why the same should not be cancelled, be now set aside and held for naught and that the motion to dismiss this cause be overruled and that the said cross-petitioners, Arbuckle, Ryan and Company, pay the costs of this proceeding, taxed at $8—.

Done at chambers at the city of Cleveland, this 8th day of February, A. D. 1895.

(Signed) AUGUSTUS J. RICKS,
U. S. Dist. J.

127 *Motion of Railway Company to Dismiss in Accordance with Opinion of Court of Appeals and the Statutes. Filed October 9, 1895.*

Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *v.* THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company, Defendant.	In Equity. Motion to Dismiss.

Now comes the said defendant, The Put-in-Bay Water Works, Light and Railway Company, by its counsel appearing in that behalf, and moves the court to dismiss said action, and to direct the receiver heretofore appointed in this action to forthwith deliver the property of this defendant, now in his possession and under his control, to the said defendant, The Put-in-Bay Water Works, Light and Railway Company, for the following reasons:

First. That the mandate of the circuit court of appeals, heretofore filed herein, reverses the decree theretofore entered by this court on the 22d day of December, 1892, and directs this court to take proceedings in conformity with the opinion of that court, and commands that such execution and further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Second. That the circuit court of appeals for the sixth circuit, having had and considered a complete record of the above-entitled cause, on a hearing of an appeal of The Industrial and Mining Guaranty Company, one of the defendants in said cause, from
128 an interlocutory decree of this court refusing to grant the motions theretofore made therein to discharge the receiver theretofore appointed, to dissolve the injunction theretofore granted, and to modify the order to said receiver to issue certificates of indebtedness theretofore made, and continuing the same; and said circuit court of appeals having found, from the consideration of said record, that the amount involved in said cause was not sufficient to invoke the original jurisdiction of this court, and having further found that the equitable jurisdiction of this court was collusively obtained, it becomes the duty of this court to dismiss said action in conformity to said opinion.

Third. It having been clearly shown in the pleadings of said cause before this court, that the cause was collusively and fraudulently brought, and that the court of appeals, upon consideration thereof, in said appeal having so found and determined, it becomes the duty of this court to dismiss said cause, under and in pursuance of section 5 of the act of March 3d, 1875. (Supplement to Revised Statutes U. S., page 83.)

Fourth. It having been clearly shown in the pleadings of said cause

before this court, that the amount involved in said action was not sufficient to invoke the jurisdiction of this court, and the said circuit court of appeals having so found and determined, it becomes the duty of this court to dismiss said cause, under and in pursuance of section 1, act of March 3d, 1887. (24 U. S. Statutes at Large, chap. 373, page 552.)

E. G. LOVE,
Solicitor for Def't The Put-in-Bay Water Works, L. & R'y Co.

(Endorsement:) Motion of def't R'y Co. to dismiss. Filed Oct. 9, 1895. Irvin Belford, clerk.

129 The Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & Railway Company *et al.* } In Equity. No. 1087.

Notice.

To —— ——:

You are hereby notified that on May 6th, 1896, his honor Henry F. Severens entered a certain order in this cause requiring all parties who have appeared herein to show cause before this court, on Thursday, May 14th, 1896, at the court-room, in Toledo, at 10:00 o'clock a. m., why the prayer of the petition of the defendant The Put-in-Bay Water Works, Light & Railway Company for a release to it of property now in the hands of the receiver in this cause should not be granted.

A copy of the said order and of the motion or petition therein referred to is hereto attached.

E. G. LOVE.
Solicitor for the Put-in-Bay Water Works, Light & R'y Co.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY COMPANY, The Railway Equipment Company, Arbuckle, Ryan & Company, James K. Tillotson, The Cleveland Electrical Manufacturing Company, The Industrial Mining & Guaranty Company, John P. Carrothers, and H. H. Warner.

Suit pending in the said court this fifth day of May, 1896, before Hon. H. F. Severens, district judge, at chambers.

The above-named defendant, The Put-in-Bay Water Works, Light & Railway Company, having heretofore filed its petition for a release to it of the property now in the hands of the receiver in this cause, upon consideration thereof it is now ordered—

130 That all the other parties who have appeared in this cause show cause before this court on the 14th day of May, inst., at the court-room, in the city of Toledo, at 10.00 o'clock in the forenoon, why the prayer of said petition should not be granted.

And it is further ordered that notice of such hearing be given to the solicitors of all the parties who have so appeared by causing to be served upon them respectively a copy of this order and of the said petition at least four days before the day above fixed for hearing; and it is further ordered that any other party or parties who may be interested in the action of the court to be taken upon said petition have leave to intervene and be heard at the hearing above mentioned.

H. F. SEVERENS,
U. S. Dist. Judge, Acting under Designation.

The Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & Railway Company *et al.*
No. 1087. In Equity.

Motion to Dismiss.

Now comes the said defendant, The Put-in-Bay Water Works, Light and Railway Company, by its counsel appearing in that behalf, and moves the court to dismiss said action and to direct the receiver heretofore appointed in this action to forthwith deliver the property of this defendant now in his possession and under his control to the said defendant, The Put-in-Bay Water Works, Light and Railway Company, for the following reasons:

First. That the mandate of the circuit court of appeals heretofore filed herein reverses the decree theretofore entered by this court on the 22nd day of December, 1892, and directs this court to take proceedings in conformity with the opinion of that court and commands that such execution and further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

131 Second. That the circuit court of appeals for the sixth circuit having had and considered a complete record of the above-entitled cause on the hearing of an appeal of The Industrial Mining and Guaranty Company, one of the defendants in said cause, from an interlocutory decree of this court refusing to grant the motion theretofore made therein to discharge the receiver theretofore appointed, to dissolve the injunction theretofore granted, and to modify the order to said receiver to issue certificates of indebtedness theretofore made and continuing the same, and said circuit court of appeals having found from the consideration of said record that the amount involved in said cause was not sufficient to invoke the original jurisdiction of this court, and having further found that the equitable jurisdiction of this court was collusively obtained, it be-

comes the duty of this court to dismiss said action in conformity to said opinion.

Third. It having been clearly shown in the pleadings of said cause before this court that the cause was collusively and fraudulently brought, and the court of appeals, upon consideration thereof, in said appeal having so found and determined, it becomes the duty of this court to dismiss said cause under and in pursuance of section five of the act of March 3rd, 1875. Supp. Rev. Stat. U. S., page 83.

Fourth. It having been clearly shown in the pleadings of said cause before this court that the amount involved in said action was not sufficient to invoke the jurisdiction of this court, and the said circuit court of appeals having so found and determined, it becomes the duty of this court to dismiss said cause under and in pursuance of section one, act of March 3rd, 1887. 24 U. S. Stat. at Large, chap. 373, page 552.

E. G. LOVE,
Solicitor for Def't The Put-in-Bay Water Works, L. & R'y Co.

We hereby acknowledge service of a copy of the foregoing notice and the order and motion or petition attached to said notice this 9th day of May, 1896.

E. W. TOLERTON.
M. G. BLOCH.
STEPHEN BROPHY.
DOYLE & LEWIS.
132 PARKS, VAN CAMPEN & ADELSPERGER.
GEO. B. BOONE.

U. S. Circuit Court, Northern Dist. of Ohio, Western Division, *ss:*

On the 9th day of May, 1896, at Toledo, Ohio, I served this writ on P. A. McGahn, Henry E. Howe, and Charles G. Wilson, by leaving with each of them a true and certified copy thereof and on Bostwick, Braun & Co., by leaving with Carl F. Braun, a member of the firm, a true copy thereof.

M. A. SMALLEY,
United States Marshal,
By R. A. FORD, *Deputy.*

Serving 4 copies of notice, order & motion, 12 services, $24.00; travel, 50; return, 10; total, $24.60.

(Endorsement:) 1087. Electrical S. Co. *vs.* The Put-in-Bay W. W., L. & R'y Co. Notice of hearing before Hon. H. F. Severens, May 14, 1896. Filed May 16, 1896. Irvin Belford, clerk.

133 *Judge Severens' Order Directing Parties to Show Cause Why Property Should Not Be Released. Filed May 6, 1896.*

(Entered) Wednesday, May 6, 1896.

THE ELECTRICAL SUPPLY CO.
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, The Railway Equipment Company, Arbuckle, Ryan & Company, James K. Tillotson, The Cleveland Electrical Mfg. Co., The Industrial Mining and Guaranty Company, John P. Carrothers, and H. H. Warner. } No. 1087.

Suit pending in the said court this fifth day of May, 1896, before Hon. H. F. Severens, district judge, at chambers.

134 The above-named defendant, The Put-in-Bay Water Works, Light and Railway Company, having heretofore filed its petition for a release to it of the property now in the hands of the receiver in this cause upon consideration thereof, it is now ordered:

That all of the other parties who have appeared in this cause, show cause before this court on the 14th day of May, inst., at the court-room in the city of Toledo, at 10 o'clock in the forenoon why the prayer of said petition should not be granted.

And it is further ordered that notice of such hearing be given to the solicitors of all the parties who have so appeared, by causing to be served upon them respectively a copy of this order and of the said petition, at least four days before the day above fixed for hearing.

And it is further ordered that any other party or parties who may be interested in the action of the court to be taken upon said petition, have leave to intervene and be heard at the hearing above mentioned.

H. F. SEVERENS,
U. S. District Judge, Acting under Designation.

135 Opinion of Judge Severens vacating order of March 25, 1896, authorizing lease to Arbuckle, Ryan and Company and denying motion of railway company praying a surrender of its property and a dismissal of suit, rendered June 3, 1896; filed June 5, 1896.

The Circuit Court of the United States for the Northern District of Ohio, Western Division.

ELECTRICAL SUPPLY COMPANY, Complainant,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY *et al.*, Defendants. } In Equity.

In this cause, I am of the opinion that the recent order authorizing the receiver to lease the property in his possession for the cur-

rent season and the lease made thereunder to Arbuckle, Ryan and Company should be vacated, the vacating order to be subject, however, to this further direction and order, that the receiver immediately proceed to offer such a lease of the property to the highest bidder, upon ten days' notice to be published for one week in two Toledo daily papers, and to be posted for the same length of time in three of the most conspicuous places on the line of the railroad, at a time and place fixed by the notice; that at the time and place so fixed, the receiver offer a lease of the property to the highest bidder at an upset price of $1,000.00 and if no person shall offer more than that sum, the former lease order to stand and be reinstated declared to be operative and effectual according to its terms.

I am further of the opinion, that the motion heretofore made upon the petition of the Put-in-Bay Water Works, Light and Railway Company, directing the receiver to surrender the property in
136 his hands and dismissing the suit, should be denied, my opinion being that there are certain charges incurred in the receivership, the extent of which is not now determined, which must be ascertained and satisfied before the property can be released and the case dismissed, even if the case be dismissed and the property surrendered. This order, however, to be without prejudice to a renewal of a like application and motion when the situation of the case shall be ripe for a dismissal.

Counsel will attend to the drawing of proper orders to carry these directions into effect.

H. F. SEVERENS,
District Judge

Dated June 4, 1896.

(Endorsement:) No. 1087. U. S. circuit court, northern dist. of Ohio, western division. Electrical Supply Co. *vs.* Put-in-Bay W. W., L. & R'y Co. Conclusions of court. Filed Jun. 5, 1896. Irvin Belford, clerk.

United States Circuit —, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *v.* THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*	No. 1087. In Equity.

Petition.

Now comes The Put-in-Bay Water Works, Light and Railway Company, your petitioner, and one of the respondents in the above-entitled cause, and respectfully shows to this honorable court that on the 4th day of June, A. D. 1896, the Honorable H. F. Severens, sitting as circuit judge under special designation, rendered an opinion in this cause, denying a motion made by your petitioner
137 hereto- filed herein on the — day of ——, 1895, which said motion or petition prayed for an order dismissing this cause

for want of jurisdiction pursuant to the statutes in said motion referred to and in conformity with the opinion of the United States circuit court of appeals, and also praying in said motion for an order directing said receiver to restore the property of said respondent, your petitioner, to it, for the reason that said judge was of the opinion that there were certain charges incurred in the receivership herein, the extent of which is not yet determined and which should be ascertained and satisfied before the property of said respondent, your petitioner, could be released and the case dismissed; said judge was further of the opinion that the denial of said motion to dismiss and restore said property should be without prejudice to a renewal of a like application when the situation of the case should be ripe for dismissal.

Your petitioner further shows that on June 10, 1896, an order was entered in this cause, directing the said receiver to lease the property of your petitioner from the date of sale to October 1, 1896, and that a sale of said lease should be made to the highest bidder as shown by the terms of said order; that said order of the court further provided that the said sale of said lease should be made subject among other conditions to the following condition: "Said lease shall fully end and terminate on the first day of October, 1896, and said lessee shall yield up the possession of said railway and other property and terminate said lease, without rebate from the amount paid, or to be paid for said lease, at any time during the term of said lease, if said property shall be sold at judicial sale under the order of said court, or shall, by the orders of said court be turned back to said defendant railroad company," and the said condition was recited in full in the notices published and given by said receiver of the sale of said lease; that a sale of said lease was had in pursuance
138 of the order of said court and the notices so published on June 23, 1896, at the United States court-room at Toledo, Ohio, and the said lease was struck off, as shown by the return of said receiver of said sale to Breyman Bros., of Toledo, Ohio, for the sum of $2,905.00; that by the terms of said order and in compliance therewith said Breyman Bros. paid to said receiver on the day of sale $969.00, and obligated themselves to pay the balance of said purchase price, one-half in thirty days, and one-half in forty-five days from the said day of sale, as is more fully shown by the record of this case to which reference is hereby made.

Your petitioner further shows that said Breyman Bros. are cross-petitioners in this cause and parties thereto, and allege that they have some claim or lien upon the property of your petitioner herein so in the possession of said receiver.

Your petitioner further represents that it is ready and willing and hereby tenders to the court a good and sufficient bond for the payment of all charges incurred in said receivership, that may be finally determined a first and prior lien upon the property of your petitioner.

Wherefore, your petitioner prays that an order may be entered in this cause directing the receiver to forthwith deliver to your petitioner all of the property of your petitioner of every kind and descrip-

tion now in his custody or under his control by virtue of his appointment as receiver aforesaid, upon the filing by your petitioner of the bond hereinbefore tendered and the approval thereof by the court; that said receiver be directed to cancel the lease authorized by said order to be made by him to the successful bidder as aforesaid, and to refund to such successful bidder or lessee the money so paid by them on account of said lease, and that said receiver be directed to require such lessee to account for and pay over to said receiver all of the earnings of the property of your petitioner that may accrue during the period said lease may be in operation.

139 Your petitioner further prays that a reference be had for the purpose of ascertaining the amount of the charges incurred by the receiver herein with particular reference as to the disposition made by the receiver of the proceeds of the receiver's certificates heretofore issued in this action, the purposes for which, the persons to whom and the dates the same were made; that said reference shall include the ascertainment of any other charges made in said receivership and the purposes for which the same were created.

E. G. LOVE,
Solicitor for said Petitioner.

STATE OF OHIO,)
Hamilton County,) *ss:*

John P. Carrothers, being duly sworn, says that he is the president of the petitioner herein, The Put-in-Bay Water Works, Light and Railway Company; that the facts set forth in the foregoing petition are true as he verily believes.

JOHN P. CARROTHERS.

Sworn to before me, and subscribed in my presence this 25th day of June, A. D. 1896.

A. L. HERRLINGER,
[SEAL.] *Notary Public in and for Hamilton County, Ohio.*

(Endorsement:) #1087. United States circuit court, northern dist. Ohio, western division. The Electrical Supply Co. *vs.* The Put-in-Bay Water Works, Light and R'y Co. *et al.* Petition of P. W. W., L. & R'y Co. Filed Jun- 26, 1896. Irvin Belford, clerk. E. G. Love, solicitor for P. W. W., L. & R'y Co.

140 Order of Judge Severens granting railway company's petition for restoration of property upon giving bond, and directing a reference to Mr. Bentley to ascertain expenditures made by the Arbuckle-Ryan Co. under the vacated lease. Filed July 15, 1896.

(Entered) Wednesday, July 15, 1896.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY *et al.*, Respondents. } No. 1087.

On this day came the parties by their attorneys, and this cause came on to be heard on a petition of the respondent, The Put-in-Bay Water Works, Light and Railroad Company, heretofore filed herein on June 26, 1896, for an order restoring to said petitioner its railroad and other property now in the hands of the receiver of this action, L. S. Baumgardner, and tendering sufficient bond for the payment of all charges incurred in the receivership in this action that may finally be determined to be a lien upon the property of said respondent company, and the court having heard the arguments of counsel and the evidence in support of said petition, find that the prayer of said petition for restoration of said property of said respondents should be granted upon the giving of a good and sufficient bond for the payment of such charges incurred in such receivership including certificates issued by him, as shall finally be determined a lien upon the property of said respondent, and the said respondent having given notice of its intention to file a motion to

141 set aside said lease heretofore made by the receiver herein on the 23d day of June, 1896, the application in said petition for the setting aside of said lease is passed for further hearing.

And the court further orders that in the event of the giving of such bond as aforesaid, the moneys paid and to be paid to the receiver under said lease should be paid over to said respondent company, subject, however, to the following provision:

That the receiver retain in his hands sufficient to pay, first, the costs of the reference hereby ordered; second, the costs and expenses incurred in the making of the pending lease; and third, such sum as may be found due to the Arbuckle-Ryan Co. for their expenses incurred in repairs upon the reference hereby ordered, the sum which he is authorized to retain being limited to the amount of $1,600.00.

It is therefore ordered, adjudged and decreed by the court that upon the said respondent, The Put-in-Bay Water-works, Light and Railway Company, giving its certain bond to the clerk of this court, for the use and benefit of the parties who may hereafter be found entitled thereto in the sum of twenty thousand dollars, and with sureties to be approved by the clerk of this court, and having therein the following conditions, to wit: that the obligors of said bond bind themselves to secure the payment of all charges incurred in the receivership in this action, including his certificates aforesaid, which may finally be determined to be a lien upon the property of said re

spondent, The Put-in-Bay Water Works, Light and Railway Co
pany, and shall, in giving this bond, submit themselves to the jur
diction of this court to the end and that this court may make such bo
effectual for the collection of said charges by order or decree in th
cause, that may be finally determined as aforesaid, said receiver tu
over to said defendant company, all the property of said defenda
now in his hands as such receiver, including its railroad.

142 It is further ordered that this decree shall in no way inte
fere with the possession of said les-ee under the lease her
tofore made under the sale of June 23, 1896.

And it further appearing to the court that the Arbuckle-Rya
Company claim to have made certain improvements and repairs upo
the property of said respondents railway company in putting sai
property in condition for operating for the season of 1896.

It is ordered that Chas. S. Bentley be and is hereby appointed
special master commissioner *pro hac vice* with directions to proce
forthwith to take testimony as to the expenditures claimed to hav
been made by said Arbuckle-Ryan Company in and about the prep
aration of the railroad of said petitioner for operation during th
season of 1896, together with the dates of the items of such expend
itures respectively, and upon the question whether same were in
curred in good faith, and that the petitioner, The Put-in-Bay Wate
Works, Light and Railway Company and all other interested partie
shall be permitted to produce witnesses before such special maste
relative to said expenditures, and shall be permitted to cross-ex
amine the witnesses produced by the said The Arbuckle-Ryan Com
pany in accordance with the usual manner of taking testimony, that
the said petitioner, The Put-in-Bay Water Works, Light and Railway
Company, shall be permitted to present to said special master, and
adduce testimony concerning any claims for damages accrued to it
by reason of any action of the said Arbuckle-Ryan Company or its
agents, while claiming to occupy, repair or use such property as
lessee under the former order of this court, and that said master is
hereby instructed to report to this court without delay in his findings
of fact and conclusion of law as to the validity of such claims made
by the Arbuckle-Ryan Company, including the good faith with
which they were created, and of the said petitioner, The Put-

143 in-Bay Water Works, Light and Railway Company, as to
whether the claims of the said Arbuckle-Ryan Company
should be allowed.

And it is further ordered that upon the turning over by the re
ceiver of the property now in his hand to the respondent company,
he make further report of his doings and accounts since the date of
his last report upon those general subjects.

(Endorsed:) Entry approved. H. F. Severens, U. S. dist. judge.

144 *Order Vacating Order to Restore Property upon Filing of Bond.*

Filed April 17, 1897.

December Term, A. D. 1896, to wit, April 17, 1897.

Present: The Honorable H. F. Severens, U. S. dist. judge under designation.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Respondents. } No. 1087. Decree.

It appearing under the decree entered herein on July 15, 1896, providing for a restoration of the property in the hands of the receiver, L. S. Baumgardner, heretofore appointed in this cause to the defendant, The Put-in-Bay Water Works, Light and Railway Company upon the said company filing a bond as provided in said decree, and further under the decree of January 6, 1897, extending the time for the filing of said bond to March 1, 1897, that said defendant, The Put-in-Bay Water Works, Light and Railway Company, has not filed said bond, now, therefore, it is here ordered and decreed that the said decree of July 15, 1896, be and it is hereby set aside and held for naught.

145 *Motion of Railway Company for Reference to Enable Court to Determine Against Whom Liabilities of Receivership Should be Charges.*

Filed April 17, 1897.

United States Circuit Court, Northern District Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Respondents. } No. 1087. Motion.

Now comes the defendant, The Put-in-Bay Water Works, Light and Railway Company and moves the court that, for the purpose of enabling the court to determine against whom the expenses of the receivership herein including the receiver's certificates heretofore issued herein shall be charged, an order be entered herein appointing a special master commissioner to take testimony for the purpose of ascertaining and reporting to this court, the facts with reference:

First. To what extent the liabilities created by the receiver herein by the issuing of receiver's certificates have resulted in permanent benefit to the property of this defendant.

Second. To what extent the liabilities so created, including the

costs of this cause, have not resulted in permanent benefit to the property of this defendant.

Third. To what extent the proceeds of the receiver's certificates so issued were used for the payment of labor claims accruing prior to the appointment of the receiver which were liens against the property of this defendant.

146 Fourth. To what extent the proceeds of the respective issues of receiver's certificates heretofore issued by the receiver herein, have been expended by said receiver in conformity to the respective order authorizing their issue.

E. G. LOVE,
Solicitor for the Put-in-Bay Water Works, Light and Railway Company.

(Endorsement:) No. 1087. United States circuit court, northern district of Ohio, western division. Motion to appoint special master. Filed April 16, 1897. Irvin Belford, clerk.

147 *Order Referring Cause to Master to Ascertain Disposition of Proceeds of Receiver's Certificates, Costs, Expenses, etc.*

Filed April 17, 1897.

December Term, A. D. 1896, to wit, April 17, 1897.

Present: The Honorable H. F. Severens, U. S. dist. judge under designation.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Respondents.
No. 1087. Order.

This day this cause came on to be heard upon the motion of the Put-in-Bay Water Works, Light and Railway Company praying for an order appointing a special master commissioner herein to take testimony for the purpose of ascertaining and reporting to this court the facts with reference to the liabilties created by the receiver herein including the costs created in this case, as set forth in said motion: and the court being now fully advised in the premises do sustain said motion in part and to the extent hereinafter indicated; and it is now here thereupon and further—

Ordered, that, for the purpose of enabling this court to finally determine against whom the liabilities of the receivership herein, including the costs of this cause shall be charged, W. H. Harris, Esq., be and he is hereby appointed a special master commissioner, *pro hac vice*, with directions to proceed forthwith to take the testimony of the receiver herein and of such witnesses as may be produced before him by said receiver and the other parties to this cause, and that he report, within twenty (20) days from the filing of this

148 decree, the said testimony, together with his findings of facts therefrom (in determining which facts the master may con-

sider such pleadings and records and testimony as may have been heretofore filed in this case) to what extent the expenditures and liabilities of the receiver have been incurred.

First. In permanent improvements on the company's track or property and additions to its plant.

Second. In the care and preservation of the company's property.

Third. In discharge of any liens upon the property.

Fourth. In payment of the indebtedness for labor expended upon the property which had been incurred prior to the appointment of the receiver.

Fifth. In other and what expenses of the trust.

Sixth. In matters, if any, outside of the authority given by the orders of the court authorizing the issue and sale of said receiver's certificates.

Also to hear testimony and report to the court:

First. What compensation the receiver is entitled to in caring for and preserving the property, and his management as receiver.

Second. What counsel fees should be allowed for legal services rendered to the receiver in the management of his said trust.

Third. What costs have been incurred by the Put-in-Bay Water Works, Light and Railway Company in the progress of this cause, intending hereby those which are taxable.

Fourth. To what extent the expenditures and liabilities incurred by the receiver have resulted in permanent benefit to the property of the Put-in-Bay Water Works, Light and Railway Company.

And it is further ordered that the said master commissioner give three days' notice of the time and place of hearing to be had in pursuance hereof to the receiver herein and all the parties to this cause or their attorneys of record herein; and that he give
149 like special notice of said hearing to the complainant, The Electrical Supply Company, and the respondent, James K. Tillotson, by causing each of them, or their respective attorneys of record herein, to be duly served with a copy of this order together with notice of the time and place of hearing. Except as herein ordered the said motion of the Put-in-Bay Water Works, Light and Railway Company is overruled.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRIC SUPPLY COMPANY *vs.* PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY.	In Chancery.

Second Supplemental Intervening Petition of Treasurer of Ottawa County, Ohio.

Now comes Frank Holt and says that he is the duly elected, qualified, and acting treasurer of Ottawa county, Ohio, and by leave of court files this supplemental intervening petition herein, and says

that as such treasurer he is charged with the duty of collecting all taxes levied and assessed upon the real and personal property situate in said Ottawa county, Ohio.

Defendant says that there was duly levied upon the personal property described in the original bill of complaint, the several cross-bills, and inventory of the receiver filed herein (which property then was and still is situated in said Ottawa county, Ohio) for the taxes for the year 1897 the sum of six hundred and nine and $\frac{95}{100}$ (609.95) dollars, and that since the filing of the supplemental intervening petition by the treasurer of said county there has been added, in accordance with the statutes of the State of Ohio, to the taxes for year 1896, as penalty for non-payment, the sum of twenty-eight and $\frac{70}{100}$ (28.70) dollars.

150 That the following is a statement of all the taxes and penalties standing against said property and unpaid upon the grand tax duplicate of said Ottawa county:

For the year 1893, the sum of $552.75.
For the year 1894, the sum of 585.75.
For the year 1895, the sum of 290.40.
For the year 1896, the sum of 644.60.
For the year 1897, the sum of 609.95.

That the total amount of taxes and penalties so due and unpaid is the sum of twenty-six hundred and eighty-two and $\frac{85}{100}$ (2,682.85) dollars, and that the same is the first and best lien upon and against said personal property and against any fund produced by the sale of or rental of the same. This intervening petitioner says that the receiver herein should pay said taxes and penalties out of the funds in his hands before paying any claims whatsoever.

Wherefor this defendant as such treasurer respectfully prays this honorable court that the above sum be declared to be the first and best lien upon said personal property and upon any funds in the hands of said receiver, and that the same be ordered paid and for all other and proper relief.

CHAS. G. WILSON,
WM. GORDON,
Solicitors for Intervening Petitioner.

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, Ottawa County, } *ss:*

On this 24th day of December, 1897, before me personally appeared Frank Holt, the above-named intervening petitioner, treasurer of said Ottawa county, who made solemn oath that he read the foregoing intervening petition subscribed by me and knows the contents, and that the same are true.

FRANK HOLT.

Sworn to before me and subscribed in my presence this 24th day of December, A. D. 1897.

J. H. UTHOFF,
Notary Public. [SEAL.]

(Endorsement:) Circuit court of U. S., N. D. of Ohio, western div. #1087. The Electric Supply Co. *vs.* The Put-in-Bay Water Works, Light and Railway Co. Second supplemental intervening petition, treasurer of Ottawa Co. Filed Dec. 29, 1897. Irvin Belford, clerk. Charles G. Wilson, attorney, Toledo, Ohio.

151 *Decree Overruling Motion to Reopen Question of Jurisdiction.*

Filed December 30, 1897.

December Term, A. D. 1897, to wit, December 30, 1897.

Present: The Honorable H. F. Severens, U. S. dist. judge, under designation.

THE ELECTRICAL SUPPLY COMPANY
v.
THE PUT-IN-BAY WATER WORKS, LIGHT and RAILWAY Company *et al.* } No. 1087.

This day this cause came on for hearing upon the motion of Arbuckle, Ryan & Co. for an order allowing the said moving respondent to introduce testimony upon the question of jurisdiction heretofore determined by the United States circuit court of appeals in this cause and the affidavit filed in support of said motion.

On consideration whereof the court find that said Arbuckle, Ryan and Company have been guilty of laches in the filing of said motion and that the same for that reason, and also because this court
152 is of opinion that the matter is foreclosed by the decision of the circuit court of appeals in this cause, be overruled and the court further find said motion is not well taken.

It is, therefore, ordered and decreed that the same be and it is hereby overruled.

Decree Confirming Receiver's Reports and Master's Reports. Filed December 30, 1897.

December Term, A. D. 1897, to wit, December 30, 1897.

Present: The Honorable H. F. Severens, U. S. district judge, under designation.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY Company *et al.*, Defendants. } No. 1087.

This cause this day came on to be heard upon the exceptions filed herein to the report of the Master Commissioner Belford,
153 filed herein April 3, 1896, and were argued by counsel, and the court being fully advised in the premises overrules said exceptions and confirms said report and the court allows to said Master Belford as compensation for his services as such master and

including all expenses, the sum of one hundred and sixty dollars ($160), and to Clement Carpenter, the stenographer employed by said Master Belford, the court allows as compensation the sum of one hundred and ten dollars ($110). And it is ordered by the court that the receiver herein pay out of any funds in his hands the compensation herein allowed to said Master Belford and the compensation allowed to said Carpenter, and also the witness fees taxed in said hearing before said Master Belford.

And it is further adjudged by said court that said Walker P. Hall is the lawful holder of the receiver's certificates in question in said report, except certificate No. 20 of which the court finds that E. J. Dodge is the lawful holder, and that said Hall and said Dodge are entitled to receive payment of said certificates out of the funds in the hands of this court, or out of any funds which may hereafter come into the hands of this court, or be created for such purpose.

And this cause coming on for further hearing upon the motion filed herein by Walker P. Hall for the distribution of funds now in the hands of said receiver, was argued by counsel, and the court, being fully advised in the premises, overrules said motion.

And this cause coming on for further hearing upon the several reports of the receiver filed herein, and the court being fully advised in the premises, confirms said reports. And thereupon it is ordered by the court that said receiver be allowed as compensation for services to this date the sum of nine hundred and fifty dollars ($950), including the sum of eight hundred dollars ($800), reported by Master Commissioner Harris. And it is further ordered that said receiver be allowed for attorneys' fees paid to this date the
154 sum of six hundred dollars ($600), including the five hundred dollars ($500) allowed in the report of Master Commissioner Harris.

And this cause coming on for further hearing upon the exception filed herein to the report of Master Commissioner Harris filed herein, were argued by counsel, and the court, being fully advised in the premises, overrules said exceptions and confirms said report. And said court allows to said Master Commissioner Harris as compensation for his services as such master, the sum of two hundred and fifty dollars. And said court further allows to George Bassatt as stenographer for services performed for said Master Commissioner Harris in said hearing, the sum of one hundred and fifty dollars. And it is ordered by the court that said receiver pay out of any funds in his hands the amounts heretofore allowed to said Master Commissioner Harris and said Stenographer Bassatt, and also the witness fees taxed in said hearing before said Commissioner Harris.

155 *Opinion of Judge Severens. Filed January* 31, 1898.

Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Respondents.
No. 1087. In Equity.

The court having passed certain orders in this case confirming the master's reports upon the reference to Irvin Belford, Esq., as special master, and upon the later reference to Wm. H. Harris, as special master, and having also adjudged certain receiver's certificates held by Walker P. Hall and another to be valid and rightfully payable out of the funds and property in the hands of the court by its receiver, it thereupon appears that there is not a sufficient available fund in the hands of the receiver with which to satisfy the receiver's certificates and other necessary charges upon the fund. It therefore appears to be necessary to sell the railroad and the other real estate and fixtures belonging to the works of the Put-in-Bay Water Works, Light and Railway Company, in order to raise a fund necessary to completely satisfy the charges. This brings the court to the necessity of determining certain other matters which have inhered in the case all along, but which it has not hitherto been found to be necessary to finally dispose of, the action of the court having been in the main concerned with a question as to how ths court could so shape the proceedings so as to enable it to dismiss the original bill as one collusively and fraudulently filed. The matters now particularly referred to as standing in the way of final disposition, by sale of the property, are the petitions of Arbuckle,
156 Ryan & Co., and others having like claims for the enforcement of liens against the property in the hands of the receiver for materials and labor supplied to the Put-in-Bay Water Works, Light and Railway Company, and certain petitions which have been filed, in behalf of the county in which the property is situated, for the taxes which have been levied upon it during the time it has been in the hands of the receiver. These parties are now pressing the court for recognition of their claims, and for an adjudication establishing their rights in the property now in the hands of the court.

The original bill was filed September 9, 1892, and the property was soon after taken into custody by the appointment of a receiver. On the following 30th day of September, Arbuckle, Ryan and Company filed what is called their cross-bill, which is in substance an intervening petition, setting up their contract with the Put-in-Bay Water Works, Light and Railway Company and the amount of labor and material which they had furnished in the execution of it, and their compliance with the statutory requirements of the State, giv-

ing them a lien, and they prayed therein for the enforcement of their lien. Other cross-bills of a like character were filed by other parties, and later on and during the pendency of the suit petitions for orders requiring the payment of taxes have been filed. Some three or four months after the filing of the original bill and the various cross-bills and after the receiver had been authorized to issue receiver's certificates and had in fact issued and sold them, and after the receiver had been for some months in possession, it appeared on a motion to dissolve the injunction theretofore ordered, heard in the late days of December, 1892, mainly through an affidavit submitted on that occasion, that the suit had been collusively brought; or, to be more exact, an affidavit was then filed upon which, in the court of appeals a year later, it was held that the proceedings were collusive, and by plain inference that the court below should have dismissed it on the facts as they appeared upon the hearing had
157 in the circuit court when the motion to dissolve the injunction was refused. It was for that reason that the circuit court of appeals reversed the order of this court refusing to dissolve the injunction. But this court, although fully recognizing what it has deemed its duty under the decision of the court of appeals, and although it has been endeavoring to bring the case into such a condition as that the cause could be dismissed for the reasons stated by the circuit court of appeals, has nevertheless retained the possession of the property in the hands of the receiver, and this against the repeated motions of the Put-in-Bay Water Works, Light and Railway Company to dismiss the bill. While recognizing that the court had no jurisdiction to proceed and decree the relief prayed upon the original bill, because of the collusion of the parties, it still had jurisdiction to remedy the mischief which had been wrought by taking and exercising jurisdiction and to prevent persons, who had acted in good faith upon the action of the court while it was in possession on apparent jurisdiction, from suffering injury. Under orders of the court made for that purpose the property has been yearly rented by the receiver and the proceeds paid into court. In a collateral way these dependent petitions or cross-bills have been mentioned to the court, and the court has intimated a strong impression that, having no power to proceed in the main case, and that as the bill must be dismissed, it would follow that everything which was incident to it must go down also. In other words, that the jurisdiction of the court which is still retained was a jurisdiction supported by the necessity of providing relief to those who had acted upon the faith of the court's orders, and that the court's authority would be limited to that necessity. But upon more mature consideration, I am satisfied that it is the duty of the court to take cognizance of the intervening petitions above referred to, and to determine the validity of the claims therein asserted, and, if found valid, to give them due effect by affording the petitioners appropriate relief. If no question had arisen in regard to
158 the jurisdiction of the court over the principal case, there could be no doubt whatever of the right of the intervenors to apply to this court, it having possession and control of the property

upon which the liens and claims rest, for the relief to which they are entitled. The fact that there was a latent infirmity in the jurisdiction arising from the unlawful conduct of the parties in instituting the suit does not in my opinion change the result. The court did in fact entertain the bill and cross-bill of the original defendant Tillotson, made an order for the appointment of a receiver and seized the property into its possession. That possession it has ever since maintained and still maintains, originally for the general purposes of the case, and more recently for the purpose of exercising the limited jurisdiction still asserted and exercised by the court for the special object already indicated. If this question be considered upon the grounds of the right of a third party to intervene for the protection of his own interest in a pending suit, it would seem to be immaterial whether the possession of the property which the court has taken into custody was rightful or not, or whether the maintenance of possession could be justified upon legal grounds. It is the fact of the actual possession which the court has taken, and that alone, which gives to the intervenor his right to appear and to be heard and to have his rights in the property ascertained and awarded to him.

In the case of Gumbel *v.* Pitkin, 124 U. S., 131, the property taken into the possession of the court by its marshal was seized upon process which was void and in a suit illegally commenced, the suit having been brought and the process issued on a Sunday, in violation — an express statute. The possession which the marshal afterwards retained under his writ, as the court afterwards held, was unlawful and he was a trespasser. Nevertheless, it was held by the supreme court that the court below had the power, and it was his duty, to entertain the petition of the third party to be let into that court and in that case to claim and obtain through its action the right
159 which he had acquired by a levy made subsequently to the first unlawful seizure, but prior to certain other levies which had been made. That case illustrates in a very forcible manner the fact that the question of the lawfulness or unlawfulness of the holding of possession by the court is wholly immaterial.

In the case of Compton *v.* Jesup, 15 C. C. A., 379, 68 Fed., 263, a dependent bill was filed by Jesup & Knox to foreclose a mortgage which was prior to a mortgage which had been in process of foreclosure in the original case. The proceedings in the original case had been carried through a final decree and sales of the mortgaged property, and those sales had been confirmed and deeds ordered to be executed, but the court retained possession for the sole purpose of protecting certain interests of the parties to the original litigation. It was at this stage of the case that Jesup and Knox intervened. If their right to intervene had been determined upon the right of citizenship it could not have been allowed, and it was objected that as the title to the property had already passed to the purchasers and the object of the suit substantially accomplished, the petitioners had no right to intervene. The court held them entitled to intervene and entertained their bill. One of the questions arising on the appeal in the circuit court of appeals was whether the right to inter-

vene had been properly allowed. Judge Taft, in a very carefully prepared opinion, reviewed the authorities upon this subject, and by reference to that part of his opinion found at pp. 278 *et seq.*, it is quite clear that the determination of the question of the right to intervene depends not at all upon the validity of the original seizure or continued possession of the property by the court, but upon the fact of the actual holding in possession. The grounds upon which the doctrine seems to rest are, first, the necessity which the court is under to defend its possession and hold the property subject to its order, and, second, the obligation it thereby assumes to itself — undertake the affording of redress to those whom it prevents, by withholding the property, from obtaining relief elsewhere. It appears to me that the case of Gumbel *v.* Pitkin goes much farther than
160 the requirements of the present cause, for here, beyond doubt, the appointment of the receiver and taking the property into custody was a perfectly lawful and justifiable act upon the facts as they then appeared in the record; and it is also clear in my opinion that the retention of possession, although for a limited purpose, is likewise lawful and proper. It can make no difference whatever to the parties who are prevented from seeking to enforce their claims upon property elsewhere with what intent or purpose this court continues its possession. For these reasons I am persuaded that it is the duty of the court to accord a right to a hearing to the several parties who have intervened. Such orders as are necessary to expedite the proceedings may be entered.

(Endorsement:) # 1087. Circuit court of the U. S., northern district of Ohio, western division. In equity. The Electrical Supply Company *vs.* The Put-in-Bay Water Works, Light and Railway Company *et als.* Opinion of the court. Filed Jan. 31, 1898. Irvin Belford, clerk.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *v.* THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*, Respondents. } No. 1087. In Equity.

Motion of the Railway Co. to Fix Liability of Receiver's Expenses, Receiver's Certificates, Tax Costs, & Dismiss Cause.

Now comes The Put-in-Bay Water Works, Light and Railway Company, one of the respondents in the above-entitled cause, and respectfully represent to this honorable court:

First. That at the October term, A. D. 1892, the United States circuit court of appeals for the sixth circuit rendered an opinion and entered a decree in said cause, whereby it was found and decreed that the amount of complainant's claim was insufficient to warrant

the jurisdiction of this honorable court, and said court further found and decreed that the jurisdiction of this court in said cause had been collusively invoked.

161 Second. That thereupon the said United States circuit court of appeals directed its mandate to this honorable court with instructions for further proceedings in conformity with the opinion of said court.

Third. That pursuant to said opinion and mandate, this court has heretofore to wit, upon April 17, 1897, caused an order to be entered in said cause, whereby it was ordered that for the purpose of enabling this court to finally determine against whom the liabilities of the receivership herein, including the costs of this cause, should be charged, W. H. Harris, Esq., was appointed special master commissioner, *pro hac vice* with directions to proceed forthwith to take testimony and report the same, together with his findings of fact therefrom, and to what extent expenditures and liabilities of the receiver have been incurred.

(1.) In permanent improvements on the company's tracks or property and additions to its plant.

(2.) In the care and preservation of the company's property.

(3.) In discharge of any lien upon the property.

(4.) In payment of the indebtedness for labor expended upon the property which had been incurred prior to the appointment of the receiver.

(5.) In other and what expenses of the trust.

(6.) In matters, if any, outside of the authority given by the orders of the court authorizing the issue and sale of said receiver's certificates.

Also to hear testimony and report to the court:

(1.) What compensation the receiver is entitled to in caring for and preserving the property, and in his management as receiver.

(2.) What counsel fees should be allowed for legal services rendered to the receiver in the management of his said trust.

(3.) What costs have been incurred by the Put-in-Bay Water Works, Light and Railway Company in the progress of this cause, intending hereby those which are taxable.

162 (4.) To what extent the expenditures and liabilities incurred by the receiver have resulted in permanent benefit to the property of the Put-in Bay Water Works, Light and Railway Company.

And it was further ordered that the said master commissioner give three days' notice of the time and place of hearing to be had in pursuance thereof, to the receiver therein and all the parties to this cause or their attorneys of record therein, and that he should give like special notice of said hearing to the complainant, The Electrical Supply Company, and the respondent, James K. Tillotson, by causing each of them or their respective attorneys of record therein, to be duly served with a copy of this order together with notice of the time and place of hearing.

Fourth. That in obedience to said order of this honorable court,

the said master did, on the 31st day of May, 1897, report the testimony taken by him and his findings of fact therefrom.

Fifth. That said master found and reported expenditures and liabilities of the receiver had been incurred:

(1.) In permanent improvements on the company's track or property and addition to its plant, $2,957.66.

(2.) In the care and preservation of the company's property, $2,992.13.

(3.) In the discharge of liens upon the property, $652.43.

(4.) In payment of indebtedness for labor expended upon the property which had been incurred prior to the appointment of the receiver, $242.79.

Other claims for indebtedness against the company which accrued prior to the appointment of the receiver, but not shown to have been for labor expended upon the property and which did not become liens upon the company's property, $2,431.21.

(5.) In other and what expenses of the trust, $4,556.15. (Under this head the master included only the actual operating expenses of the company.)

Miscellaneous expenses of the trust not properly coming under any of the foregoing designations, $161.32.

163 Other disbursements of the receiver, not included in the foregoing classifications, $3,844.46.

(6.) In matters, if any, outside of the authority given by the orders of the court authorizing the issue and sale of said receiver's certificates, $147.35.

The master further reported and found the receiver entitled to compensation in the sum of $2,000, including the $1,200, theretofore paid to him, and that his counsel was entitled to $1,500, including the $1,000 theretofore paid to them.

The master further reports the taxable costs incurred by the railway company in said cause, $—.

To what extent the expenditures and liabilities of the receiver have resulted in a permanent benefit to the property of the Put-in Bay Water Works, Light and Railway Company, $2,957.66.

Sixth. That the receiver's reports heretofore filed in said cause show that the receiver has received in earnings from the property of this respondent railway company during the period of said receivership the sum of $10,744.15. That the receiver has received in cash from said respondent railway company during the period of said receivership the sum of $2,813.62. That the receiver has used of said earnings of said respondent railway company in payment and cancellation of certificates the sum of $528. That the receiver has used the earnings of said respondent railway company in payment of items in the care and preservation of said respondent's property the sum of $1,830.53.

Seventh. That this honorable court has heretofore, to wit, on the 30th day of December, 1897, caused an order to be entered in said cause whereby the report of said special master commissioner, W. H.

Harris, Esq., was confirmed and the several reports of the receiver theretofore filed herein were by said order likewise confirmed.

Eighth. That notwithstanding said order of reference and the confirmation of said several reports, this honorable court has made no order in said cause finally determining against whom the
164 liabilities of the receivership herein and the costs of this cause shall be charged.

Ninth. That the records of this cause show and the said United States circuit court of appeals has found and determined that said cause was instituted for the purpose of avoiding the effect of an action in replevin and a suit in equity in the court of common pleas of Ottawa county, Ohio; that said litigation is still pending and constitutes an insuperable obstacle to the jurisdiction of the circuit court of the United States, to appoint a receiver of the property of this respondent, or otherwise interfere with the possession required by the action of replevin, or with the effect of the injunction, or in any manner to nullify its action in the equitable suit.

Tenth. It is further represented, that by virtue of section 1, of the act of March 3, 1887, providing that circuit court- of the United States shall have original cognizance of a controversy between citizens of different States, wherein the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, it is the duty of this court to dismiss this cause.

Eleventh. That section 5, of the act of March 3, 1875, provides "that if — any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act; the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs, as shall be just." And it having been clearly shown in the pleadings of said cause before this
165 court that this cause was collusively and fraudulently brought, and the said court of appeals upon consideration having so found and determined, it becomes the duty of this court to proceed no further herein.

Twelfth. That by virtue of section 720 of the Revised Statutes of the United States, providing that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy," it is the duty of this court to dismiss this cause.

Wherefore—your respondent moves this honorable court and prays that an order may be entered herein charging the amounts of the liabilities of the receivership in this cause including the costs of

this cause as justice and equity may require and to forthwith dismiss this cause, and your respondent will ever pray.

FORAKER, OUTCALT, GRANGER & PRIOR,
Solicitors for said Respondent.

JOHN P. CARROTHERS, *Of Counsel.*

(Endorsement:) 1087. U. S. circuit court, northern dist. of Ohio western division. The Electrical Supply Co. *vs.* The P. W. W., L and R'y Co. *et al.* Motion of R'y Co. to dismiss cause. Filed Mar 11, 1898. Irvin Belford, clerk. Foraker, Outcalt, Granger & Prior att'ys for R'y Co.

(Entered) Thursday, April 7, 1898.

THE ELECTRICAL SUPPLY COMPANY
v.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY Co. *et al.* } No. 1087.

This day this cause came on to be heard upon the motion of the defendant, The Put-in-Bay Water Works, Light and Railway Company, praying for the entry of an order fixing the liabilities of the receivership in this cause, including the costs herein, and to
166 forthwith dismiss said cause, and the same having been duly argued by counsel, and the court being fully advised in the premises, it is now hereby ordered, adjudged and decreed that the said motion be and the same is hereby overruled.

Let the foregoing be entered of record as the order of the court, April 6, 1898.

H. F. SEVERENS,
District Judge.

167 United States Circuit Court for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & Railway Company *et al.*, Respondents. } Intervening Petition of Atlantic Trust Company.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, western division, in equity:

Now comes Atlantic Trust Company, a corporation created by and existing under the laws of the State of New York and a citizen of the State of New York, and asks leave of this honorable court to file this its intervening petition against the Put-in-Bay Water Works, Light & Railway Company, a corporation organized under and by virtue of the laws of the State of Ohio and a citizen of said State, and resident of the northern district of Ohio, western division, and the other defendants in said above-entitled action.

Your orator complains and for its causes of action herein says:

First. Your orator is a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State of New York, and bearing the name of Atlantic Trust Company, and was such and so named at and during all the times hereinafter mentioned, and at and during all the times

hereinafter mentioned it was and now is fully authorized and
168 empowered, under the terms of its charter, to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trusts imposed upon it under and by virtue of the mortgage or deed of trust hereinafter described.

Second. The Put-in-Bay Water Works, Light & Railway Company (hereinafter for brevity called the Put-in-Bay Company) was heretofore and prior to the 16th day of June, 1892, duly constituted, organized, and existing as a body corporate by the name of the Put-in-Bay Water Works, Light & Railway Company under and by virtue of the laws of the State of Ohio, and was on the said 16th day of June, 1892, the owner of the line of railway and property described in the mortgage hereinafter mentioned, situate in Ottawa county, State of Ohio.

Third. On or about said 16th day of June, 1892, the said The Put-in-Bay Company, by and through its board of directors, duly authorized thereto by a vote of its stockholders and under the hand of its president and secretary and under its corporate seal, did execute and deliver to your orator its certain bonds, to wit: One hundred and twenty-five (125) bonds of one thousand dollars ($1,000), each bearing date June 16th, 1892, by each of which bonds the said The Put-in-Bay Company, for value received, promise to pay to Atlantic Trust Company of New York, trustee, or bearer, one thousand dollars ($1,000) on the first day of July, 1912, with interest at 6 %, payable semi-annually, on the first days of July and January of each and every year in which said bonds should be outstanding and unpaid, on the presentation of the proper coupons thereto attached (which said coupons represented and called for the payment of the several installments of the interest aforesaid), both the principal and interest of each of said bonds being, by the terms thereof, payable in gold at the office of Atlantic Trust Company, in the city and State of New York. Upon each of said bonds was the form of a certificate to be signed by your orator, as follows:

169 This is to certify that this bond is one of a series referred to within and is secured by the mortgage therein referred to.

——— ———, *Trustee.*

Fourth. On or about the 16th day of June, 1892, the Put-in-Bay Company did, by and through its board of directors, duly authorized thereto by a vote of its stockholders and under the hand of its president and secretary and under its corporate seal, and to secure the payment of each and every of its bonds aforesaid and interest thereon as the same should become due and payable, make, execute, and deliver to your orator its certain deed of trust or mortgage, whereby it conveyed

assigned, and set over to your orator and its successor or successors in the trust in and by said deed of trust or mortgage created and declared certain real estate, premises, and property described therein as follows, to wit (the word "grantor" and the words "party of the first part" referring to the said The Put-in-Bay Company, and the words "party of the second part" referring to your orator):

All the real estate, right of way, easements, licenses, privileges now owned or hereafter to be acquired by said grantor on Put-in-Bay or South Pass island, Ottawa county, Ohio, including its railroad, electric or other, maintained, constructed, or to be constructed, its power-house, machinery, cars, motors, apparatus, tools, buildings, structures, stations, side tracks, switches, turnouts, poles, wires, dynamos, pipes, or other apparatus, and all the property, personal, real, or mixed, by it owned or hereafter to be owned or in which it now has or hereafter shall have any right or interest, or which now is or hereafter may be at any time connected with or form a part of the plant and property of said grantor in its business of owning and operating an electric railway, electric light, and water-works plant on said Put-in-Bay or South Pass island, and everything of
170 every kind appertaining to and connected with its said business and which now has or may hereafter be acquired by it.

To have and to hold said premises, property, and franchises unto your orator and its successors in said trust and assigns forever, but upon trust, nevertheless, for the uses and purposes hereinafter mentioned and set forth in said mortgage or deed of trust as follows, to wit:

1. Until default shall be made in the payment of any installment of interest due on said bonds or any of them, or in default of the payment of said bonds or any of them, or in the observance of any covenant or agreement herein when the same shall become due, the said party of the first part shall be permitted to remain in the actual possession of said premises and property and to exercise the right and franchise relating thereto, and to collect and receive the tolls, incomes, rents, revenues, issue-, and profits thereof in any manner which will not impair the lien created by these presents.

And the party of the first part covenants and agrees with the said party of the second part that the said party of the first part shall and will from time to time pay and discharge all taxes, assessments, and governmental charges lawfully imposed on said property or any of it.

2. In case default be made in the payment of any installment of interest on said bonds or any of them when such interest shall become due and be demanded in the observance of any covenant or agreement herein, and if any such default shall continue for a period of three months, or in case default be made in the payment of the principal of said bonds or any of them, then and in every such case of default it shall be lawful for said party of the second part, as such trustee, personally or by attorney or agent, to enter upon and take possession of the premises and property herein described, and said party of the second part or its successors in said trust may at
171 its or their own discretion or upon the written request of the holders of at least one-third in amount of said bonds then

outstanding, shall proceed to bring said property herein described to sale, and for that purpose, it or they are hereby authorized and empowered absolutely to sell and dispose of said property at public auction to the highest bidder, first giving notice of the time and place of such sale by publication in some newspaper published in the city of Toledo, and of general circulation therein for at least thirty days previous to such sale, and upon such sale to make and execute to the purchaser or purchasers a good and sufficient deed or deeds of conveyance in fee-simple free and clear of encumbrances hereby created, or it or they may institute and carry on the necessary legal proceedings to bring said property to a judicial sale for the purpose of satisfying said indebtedness then remaining unpaid.

And it is hereby provided that from the proceeds of any such sale that may be made under and by virtue of the provisions aforesaid the said party of the second part, or its successors in said trust, shall after discharging all proper and legal costs and charges attending such sale and all encumbrances for taxes and assessments, pay the principal and interest of said bonds remaining unpaid.

And in case said property shall be brought to sale on account of any default in the payment of any installment of interest due on said bonds, then and in that event the principal of said bonds so remaining unpaid shall immediately become due and payable and be paid out of the proceeds of any sale that may be made of said property aforesaid.

After paying all costs and charges, as aforesaid, and the principal and interest of said bonds then remaining unpaid, said party of the second part, or its successors in said trust, shall pay over any surplus that may remain from such sale to the said party of the first part.

172 3. It is further stipulated and agreed between said parties that upon the payment by the said party of the first part of the principal and interest of said bonds and all other liens and charges under the trust hereby created, then this deed shall be null and void and of no effect, the property herein described reverting to the said party of the first part, and said party of the second part, or its successors in said trust, shall upon request reconvey said property to said party of the first part.

4. It is further stipulated and agreed that said trustee, or its successors in said trust, shall be entitled to receive proper compensation for any service or labor performed by it or them in the discharge of said trust, and that in event of the death, incapacity, or resignation of said trustee, all its estate, right, interest, power, or control over said property hereby conveyed to it shall cease and determine, but without any discontinuance of said trust, and said party of the first part, or, in the case of their failure to proceed thereto within thirty days, the holders of a majority of said bonds then outstanding may apply to the court of common pleas of Lucas county, Ohio, to appoint a new trustee, who shall be a resident of the city of Toledo, to supply the place of the trustee herein named, and when so appointed, such new trustee shall be vested for the purpose of the trust aforesaid, with all the estate, powers, and control over said

property hereby conveyed to and vested in said party of the second part, without any further assurance or conveyance of the same.

Your orator attaches to this petition a true and correct copy of said mortgage, which exhibit is marked "Exhibit A," and which your orator prays may be considered a part of this intervening petition the same as though it were fully set forth herein.

173 Fifth. The said mortgage or deed of trust was executed and acknowledged in all respects in due conformity to the laws of the State of Ohio, and was filed for record with the recorder of Ottawa county, Ohio, June 16th, 1892, at forty-five minutes after four o'clock p. m., and was on the same day duly recorded in volume W of the mortgage records of said county at pages 61 to 64.

Sixth. Prior to the aforesaid recording of said mortgage or deed of trust your orator fully accepted the trust created in and by virtue of the said mortgage or deed of trust above mentioned. Thereafter your orator signed the several certificates on each of said bonds respectively, as above mentioned, and delivered all of the said bonds to the said The Put-in-Bay Company.

Seventh. Your orator further avers that there is some controversy as to who are the actual owners of the outstanding bonds issued and sold as aforesaid by said The Put-in-Bay Company, and also avers that there is some controversy as to the number of bonds of said The Put-in-Bay Company that are now outstanding, but your orator avers that the whole amount and number of said bonds are now outstanding, and that reference should be had after default and after due and proper notice shall have been given to all parties owning or claiming any right, title, or interest in or to any of said bonds, for the purpose of determining said controversy and ascertaining who is entitled to share in the proceeds of any sale of said property described in said mortgage.

And your orator further avers, to the end that it may be fully protected in the management and enforcement of the several trusts in said mortgage or deed of trust contained, it is necessary and proper that each and every of the persons having or claiming to have ownership of or interest in or lien against said bonds or any of them, after such reference, be made parties defendant to this inter-

174 vening petition; that they and each of them may become and be bound by a decree of your honorable court herein.

Eighth. None of the semi-annual installments of interest accruing upon said bonds, as evidenced by the coupons attached thereto, has ever been paid, and default has been made in the payment of interest on said bonds, as aforesaid, and the Put-in-Bay Company has wholly failed, omitted, and refused to pay any of said installments of interest or pay the interest mentioned and provided for in said coupons due on either of said times. There became due and now remains unpaid on said bonds outstanding on the 1st day of January, 1893, the sum of $3,750, and on the 1st day of July, 1893, a like sum of $3,750, and on the 1st day of January, 1894, $3,750, and on the 1st day of July, 1894, $3,750, and on January 1st, 1895, $3,750, and on July 1st, 1895, $3,750, and on the 1st day of January, 1896, and on the 1st day of July, 1896, $3,750, and on the 1st day

of January, 1897, $3,750, and on the 1st day of July, 1897, $3,750, and on the 1st day of January, 1898, the sum of $3,750, making a total of the semi-annual payments of interest due and unpaid on said outstanding bonds and as represented by said coupons $40,250. A large number of the coupons representing interest on said bonds and due and payable on said dates above mentioned have been presented for payment at the place where the same were and are payable, to wit, at the office of Atlantic Trust Company of New York, your orator, and payment thereon has been refused.

Ninth. The holders of a large amount in value of the aforesaid bonds now outstanding and more than one-third thereof have requested your orator to enforce the remedies provided in said mortgage or deed of trust.

Tenth. Demand has been made more than three months prior to the filing of this intervening petition for the semi-annual payment of interest on said bonds as represented by said

175 coupons.

Eleventh. The financial affairs of the said The Put-in-Bay Company are in an embarrassed condition and said company is insolvent and unable to pay and discharge its debts and liabilities and said mortgaged property is an inadequate security for the payment of said bonds and coupons secured by said mortgage above described. Your orator furthermore, as trustee under said mortgage or deed of trust, cannot execute or perform the trusts imposed upon it by said mortgage or deed of trust or protect the rights of the holders of the bonds secured thereby without the aid of this honorable court, sitting in equity, and without a judicial sale of the mortgaged premises and property.

Twelfth. Your orator further says that on or about the 9th day of September, 1892, the above-named complainant, The Electrical Supply Company of the State of Connecticut, and a citizen of the State of Connecticut, filed its bill in this court against the said The Put-in-Bay Company, alleging its insolvency, and praying for the appointment of a receiver of its property; thereupon, on or about the 10th day of September, 1892, by order of this court one Leander S. Baumgardner, who then was and now is a resident of the city of Toledo, county of Lucas and State of Ohio, was appointed receiver of said The Put-in-Bay Water Works, Light & Railway Company and of its property wherever situate, and was thereby authorized, empowered, and instructed, among other things, to enter upon and take possession of all of said property and to manage, control, and operate the same, and thereafter and on or about the last-mentioned date the said Leander S. Baumgardner duly qualified as such receiver, and as such receiver entered upon and took possession of the property of the said The Put-in-Bay Water Works, Light & Railway Company, being the same property mortgaged as herein

176 alleged, and used and operated the same and now is as such receiver, under and by virtue of the order and authority of this honorable court, in possession of said property, operating and controlling the same. Your orator further says that by reason of the continued possession of said property by said receiver and this

court that he is remediless in the premises, and that he cannot enforce or carry out said trusts in accordance with the terms and conditions of the same unless he is allowed to become a party to the proceedings herein.

Your orator therefore prays as follows:

1st. That said mortgage be foreclosed and declared a lien on all the property therein and hereinabove mentioned.

2nd. That the several liens thereon of the parties to this suit be determined and marshalled according to their respective priority, and that the respondents herein be compelled to set forth what right, title, or interest in or to or lien against said above-described property or any part thereof they have, and that in default thereof they be forever barred from asserting the same.

3rd. That the number of the bonds issued, now outstanding, by said The Put-in-Bay Company and secured by said mortgage be ascertained and the amount due thereon and on the coupons thereon outstanding and secured by said mortgage be ascertained and determined.

4th. That in default of the payment of the sums so found due within a time to be fixed by your honorable court it may be decreed that the defendants and all persons claiming under or through them any interest in said mortgaged premises or property be absolutely barred and foreclosed of all right of equity of redemption in or to said mortgaged property or any part thereof, and that a sale of the whole of the mortgaged property be ordered in accordance with law and the practice of your honorable court, and that out of the money arising therefrom, after deducting from such proceeds just allowance
177 for the expenses of such sale, including attorneys' and counsel fees, and for your orator for services rendered as trustee, and for the necessary expenses incurred by it in the premises and all taxes and assessments which are a lien against said property or any part thereof, shall be paid such bonds and the interest thereon as shall be found by your honorable court accruing upon said above-mentioned bonds which had been legally and properly issued by said The Put-in-Bay Water Works, Light & Railway Company and still outstanding and unpaid without discrimination or preference ratable to the aggregate amount of such unpaid principal and accrued interest, also such claims as may be found by your honorable court a lien upon the property or any part of it covered by said mortgage and in accordance with the priority of such liens, and the balance as your honorable court may decree, and your orator prays for all further and other relief as may be just, equitable, and proper in the premises.

THE ATLANTIC TRUST COMPANY,
By PARKS & VAN CAMPEN, *Its Solicitors.*

UNITED STATES OF AMERICA, }
Northern District of Ohio, Western Division, } ss:

Lysander K. Parks, being first duly sworn according to law, says that he is one of the attorneys and solicitors of Atlantic Trust Com-

pany, the intervening petitioner in the foregoing intervening petition, and is one of the attorneys and solicitors of record of said crosscomplainant in this cause and duly authorized in the premises; that he has read the foregoing intervening petition of complainant and knows the contents thereof; that the allegations therein contained as far as they relate to his own acts are true, and as far as they relate to the acts of others he believes them to be true; that is regard to all matters and things in the foregoing intervening petition alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed and he believes the same are true.

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LYSANDER K. PARKS.

Subscribed in my presence and sworn to before me this 5th day March, 1898.

PERCY H. HOWE,
Notary Public, Lucas County, O.

[SEAL.]

(Endorsement:) #1087. In the United States circuit court for the northern district of Ohio, western division. The Electrical Supply Co., complainant, *vs.* The Put-in-Bay Water Works, Light & Railway Co. *et al.*, respondents. Intervening petition of Atlantic Trust Company. Leave is granted to file the within petition, and the defendant The Put-in-Bay Water Works, Light and Railway Company is required to plead, answer, or demur thereto within fifteen days after notice of this order and service of a copy of said petition. March 7, 1898. H. F. Severens, dist. judge. Parks & Van Campen, attorneys, Toledo, Ohio. Filed April 2, 1898. Irvin Belford, clerk.

179 *Copy Application Simon Baruch. Filed Nov.* 21, '98. *O K.*

U. S. Circuit Court, Northern District of Ohio, Western Division, *ss:*

THE ELECTRICAL SUPPLY CO., Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY Company *et al.*, Defendants. } 1087.

Now comes Simon Baruch, a citizen and resident of the city of New York, and, not intending to enter his appearance herein or otherwise become a party to this case, as *amicus curiæ* represents to the court that the Atlantic Trust Company is not a party to this cause, and that its appearance herein by counsel is wholly by parties pretending to be its counsel without any right or authority on behalf of or from said Atlantic Trust Company, as he is ready to make appear.

Said Simon Baruch further shows and represents to the court that said The Atlantic Trust Company is the trustee of a series of bonds issued by said The Put-in-Bay Water Works, Light and Railway Company, and that he is the holder of and interested in some of the said bonds, and that for said company to be brought into this cause is contrary to the interests of said bondholders and is done by

counsel assuming to represent said trust company in the interest of Arbuckle, Ryan & Co., who are asserting a mechanics' lien upon the property in controversy, which has expired under the statute of limitations of Ohio, if not made available in this case, and so it is that it is only by bringing the said trust company into this case that said mechanic lien of said Arbuckle, Ryan & Co. can be and is being made superior to the said bonds.

All of which the said Simon Baruch is ready to make appear if your honors will send out a reference by appointing a master to inquire into the right of said counsel to appear herein and enter the appearance herein of the said The Atlantic Trust Company by a cross-bill purporting to be, but is not, the cross-bill of said The Atlantic Trust Company.

SIMON BARUCH,
By HURD, BRUMBACK & THATCHER,
His Attorneys.

180 (Endorsement:) In U. S. circuit court, north. district of Ohio, W. D. Electrical Supply Co. *vs.* Put-in-Bay, etc., Co. Suggestions of Simon Baruch, *amicus curi-e.* Filed Nov. 21, 1898. Irvin Belford, clerk. Hurd, Brumback & Thatcher.

181 Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*, Respondents.
} No. 1087. In Equity.

Demurrer of the Put-in-Bay Water Works, Light and Railway Company to the Answer and Cross-petition of Arbuckle, Ryan & Company.

Comes now the respondent The Put-in-Bay Water Works, Light and Railway Company, and appearing solely for the purpose of this demurrer in conformity to the order of this honorable court requiring it to plead, demur to, or answer the cross-petition of the above-named cross-petitioner, and still protesting and objecting to the jurisdiction of this court to make said order, by protestation, not confessing or acknowledging any or all of the matters or things in the said cross-petition contained to be true, do- demur thereto and for causes of demur- shows:

First. That it appears from said cross-petition, by its own showing, that said cross-petitioner, Arbuckle, Ryan & Company, is not entitled to the discovery or relief as is thereby sought and prayed for from or against this respondent.

Second. Because it appears from said cross-petition and from the former proceedings, findings, and decrees in said cause that
182 this court is without jurisdiction to hear or determine any of the issues raised by said cross-petitioner.

Wherefore and for divers other good causes of demurrer appear-

ing on the face of said cross-petition this respondent doth demur thereto and prays the judgment of this honorable court whether they shall be compelled to make any further or other answer to said cross-petition or any of the matters and things therein contained, and further prays that said cross-petition be hence dismissed with an order for the payment of the costs made in that behalf.

FORAKER, OUTCALT, GRANGER & PRIOR,
Solicitors for Demurring Respondent.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. L. GRANGER.

STATE OF OHIO, } ss:
Hamilton County, }

W. L. Granger, being duly sworn, deposes and says that he is one of the solicitors for the above-named demurring respondent, and that the foregoing demurrer is not interposed for delay.

W. L. GRANGER.

Sworn to before me and subscribed in my presence this 19th day of November, A. D. 1898.

WM. RINCKHOFF,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

183 (Endorsement:) 1087. U. S. circuit court, northern dist. of Ohio, western division. The Electrical Supply Co. *vs.* The P. W. W., L. & R'y Co. *et al.* Demurrer of R'y Co. to answer and cross-petition of Arbuckle, Ryan & Co. Filed Nov. 21, 1898. Irvin Belford, clerk. Foraker, Outcalt, Granger & Prior, att'ys for R'y Co.

184 Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Respondents.
} No. 1087. In Equity.

Demurrer of the Put-in-Bay Water Works, Light and Railway Company to the Answer and Intervening Petition of Barbour and Starr.

Comes now the respondent The Put-in-Bay Water Works, Light and Railway Company, and appearing solely for the purpose of this demurrer in conformity to the order of this honorable court, requiring it to plead, demur to, or answer the intervening petition of the above-named intervening petitioner, and still protesting and objecting to the jurisdiction of this court to make said order, by protestation, not confessing or acknowledging any or all of the matters or things in the said intervening petition contained to be true, do demur thereto and for causes of demur shows:

First. That it appears from said intervening petition, by its own showing, that said intervening petitioner, Barbour & Starr, is not entitled to the discovery or relief as is thereby sought and prayed for from or against this respondent.

Second. Because it appears from said intervening petition and from the former proceedings, findings, and decrees in said
185 cause that this court is without jurisdiction to hear or determine any of the issues raised by said intervening petition.

Wherefore, and for divers other good causes of demurrer, appearing on the face of said intervening petition, this respondent doth demur thereto, and prays the judgment of this honorable court whether *they* shall be compelled to make any further or other answer to said intervening petition, or any of the matters and things therein contained, and further prays that said intervening petition be hence dismissed, with an order for the payment of the costs made in that behalf.

FORAKER, OUTCALT, GRANGER & PRIOR,
Solicitors for Demurring Respondent.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. L. GRANGER.

STATE OF OHIO, }
Hamilton County, } *ss:*

W. L. Granger, being duly sworn, deposes and says that he is one of the solicitors of the above-named demurring respondent, and that the foregoing demurrer is not interposed for delay.

W. L. GRANGER.

Sworn to before me and subscribed in my presence this 19th day of November, A. D. 1898.

WM. RINCKHOFF,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

186 (Endorsement:) #1087. U. S. circuit court, northern dist. of Ohio, western division. The Electrical Supply Co. *vs.* The P. W. W., L. & R'y Co. *et al.* Demurrer of R'y Co. to intervening petition of Barbour and Starr. Filed, Nov. 21, 1898. Irvin Belford, clerk. Foraker, Outcalt, Granger & Prior, atty's for R'y Co.

187 Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*, Respondents. } No. 1087. In Equity.

Demurrer of the Put-in-Bay Water Works, Light and Railway Company to the Answer and Intervening Petition of the Bodifield Belting Company.

Comes now the respondent The Put-in-Bay Water Works, Light and Railway Company, and appearing solely for the purpose of this demurrer in conformity to the order of this honorable court, requiring it to plead, demur to, or answer the intervening petition of the above-named intervening petitioner, and still protesting and objecting to the jurisdiction of this court to make said order by protestation, not confessing or acknowledging any or all of the matters or things in the said intervening petition contained to be true, do demur thereto, and for causes of demur shows:

First. That it appears from said intervening petition by its own showing that said intervening petitioner, The Bodifield Belting Company, is not entitled to the discovery or relief as is thereby sought and prayed for from or against this respondent.

Second. Because it appears from said intervening petition and from the former proceedings, findings, and decrees in said
188 cause that this court is without jurisdiction to hear or determine any of the issues raised by said intervening petition.

Wherefore and for divers other good causes of demurrer appearing on the face of said intervening petition this respondent doth demur thereto, and prays the judgment of this honorable court whether *they* shall be compelled to make any further or other answer to said intervening petition or any of the matters and things therein contained, and further prays that said intervening petition be hence dismissed with an order for the payment of the costs made in that behalf.

FORAKER, OUTCALT, GRANGER & PRIOR,
Solicitors for Demurring Respondent.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. L. GRANGER.

STATE OF OHIO, } *ss:*
Hamilton County, }

W. L. Granger, being duly sworn, deposes and says that he is one of the solicitors for the above-named demurring respondent, and that the foregoing demurrer is not interposed for delay.

W. L. GRANGER.

Sworn to before me and subscribed in my presence this 19th day of November, A. D. 1898.

WM. RINCKHOFF,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

189 (Endorsement:) 1087. U. S. circuit court, northern dist. of Ohio, western division. The Electrical Supply Co. *vs.* The P. W. W., L. & R'y Co. *et al.* Demurrer of R'y Co. to intervening petition of the Bodifield Belting Co. Filed Nov. 21, 1898. Irvin Belford, clerk. Foraker, Outcalt, Granger & Prior, att'ys for R'y Co.

190 Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*, Respondents.
} No. 1087. In Equity.

Demurrer of the Put-in-Bay Water Works, Light and Railway Company to the Answer and Intervening Petition of the Atlantic Trust Co.

Comes now the respondent The Put-in-Bay Water Works, Light and Railway Company, and appearing solely for the purpose of this demurrer in conformity to the order of this honorable court requiring it to plead, demur to, or answer the intervening petition of the above-named intervening petitioner, and still protesting and objecting to the jurisdiction of this court to make said order, by protestation, not confessing or acknowledging any or all of the matters or things in the said intervening petition contained to be true, do demur thereto, and for causes of demurrer shows:

First. That it appears from said intervening petition by its own showing that said intervening petitioner, The Atlantic Trust Co., is not entitled to the discovery or relief as is thereby sought and prayed for from or against this respondent.

Second. Because it appears from said intervening petition and from the former proceedings, findings, and decrees in said cause that this court is without jurisdiction to hear or determine any of the issues raised by said intervening petition.

Wherefore and for divers other good causes of demurrer appearing on the face of said intervening petition this respondent doth demur thereto, and prays the judgment of this honorable court whether *they* shall be compelled to make any further or other answer to said intervening petition or any of the matters and things therein contained, and further prays that said intervening petition be
191 hence dismissed with an order for the payment of the costs made in that behalf.

FORAKER, OUTCALT, GRANGER & PRIOR,
Solicitors for Demurring Respondent.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

W. L. GRANGER.

STATE OF OHIO, } ss:
Lucas County, }

W. L. Granger, being duly sworn, deposes and says that he is one of the solicitors for the above-named demurring respondent, and that the foregoing demurrer is not interposed for delay.

W. L. GRANGER.

Sworn to before me and subscribed in my presence this 21st day of November, A. D. 1898.

H. S. WOODBURY,
Notary Public, Lucas County, Ohio. [SEAL.]

(Endorsement:) 1087. U. S. circuit court, northern dist. of Ohio, W. D. The Electrical Supply Co. *vs.* The P. W. W., L. & R'y Co. *et al.* Demurrer of R'y Co. to intervening petition of the Atlantic Tr. Co. Filed Nov. 22, 1898. Irvin Belford, clerk. Foraker, Outcalt, Granger and Prior, att'ys for demurrant.

192 Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*, Respondents.
} No. 1087. In Equity.

Demurrer of the Put-in-Bay Water Works, Light and Railway Company to the Answer and Intervening Petition of Frank Holt, Treasurer.

Comes now the respondent The Put-in-Bay Water Works, Light and Railway Company, and appearing solely for the purpose of this demurrer in conformity to the order of this honorable court requiring it to plead, demur to, or answer the intervening petition of the above-named intervening petitioner, and still protesting and objecting to the jurisdiction of this court to make said order, by protestation, not confessing or acknowledging any or all of the matters or things in the said intervening petition contained to be true, demur thereto and for causes of demurrer shows:

First. That it appears from said intervening petition by its own showing that said intervening petitioner, Frank Holt, treasurer, is not entitled to the discovery or relief as is thereby sought and prayed for from or against this respondent.

Second. Because it appears from said intervening petition and from the former proceedings, findings, and decrees in said cause that this court is without jurisdiction to hear or determine any of the issues raised by said intervening petition.

Wherefore, and for divers other good causes of demurrer appearing on the face of said intervening petition, this respondent doth demur thereto, and prays the judgment of this honorable court whether *they* shall be compelled to make any further or other answer to said intervening petition or any of the matters and things therein contained, and further prays that said intervening
193 petition be hence dismissed with an order for the payment of the costs made in that behalf.

FORAKER, OUTCALT, GRANGER & PRIOR,
Solicitors for Demurring Respondent.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

W. L. GRANGER.

STATE OF OHIO, }
Lucas County, } *ss:*

W. L. Granger, being duly sworn, deposes and says that he is one of the solicitors for the above-named demurring respondent, and that the foregoing demurrer is not interposed for delay.

W. L. GRANGER.

Sworn to before me and subscribed in my presence this 21st day of November, A. D. 1898.

H. S. WOODBURY,
Notary Public, Lucas County, Ohio. [SEAL.]

(Endorsement:) 1087. U. S. circuit court, northern dist. of Ohio, W. D. The Electrical Supply Co. *vs.* The P. W. W., L. & R'y Co. *et al.* Demurrer of R'y Co. to intervening petition of Frank Holt, treas. Filed Nov. 22, 1898. Irvin Belford, clerk. Foraker, Outcalt, Granger and Prior, att'ys for demurrant.

194 June Term, A. D. 1898, to wit, November 23, 1898.

Present: The Honorable Henry F. Severens, U. S. district judge, sitting by designation.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY Company *et al.*, Respondents. } No. 1087.

This day came Frank Holt, treasurer of Ottawa county, Ohio, by his attorney, and on his motion leave is given to said Frank Holt, treasurer, to file herein a third supplemental intervening petition, setting up a claim for taxes which have accrued since the time of the filing of his last supplemental intervening petition, which said third supplemental intervening petition is filed; and thereupon, on leave of the court, the defendant Put-in-Bay Water Works, Light and Railway Company filed a demurrer to said third supplemental intervening petition of the treasurer of Ottawa county, and thereupon this cause came on to be heard upon the several demurrers of said

defendant, The Put-in-Bay Water Works, Light and Railway Company, to the intervening petition of Mahlon S. Green, treasurer of Ottawa county; the supplemental intervening petition of H. H. Mylander, treasurer of Ottawa county, Ohio; the second and third supplemental intervening petitions of Frank Holt, treasurer of Ottawa county, Ohio, setting up claims and asserting liens for taxes upon the property of said defendant, The Put-in-Bay Water Works, Light and Railway Company. On consideration whereof the court do overrule said several demurrers to the said several intervening petitions of the treasurer of Ottawa county, Ohio.

On motion the Atlantic Trust Company has leave to answer the said several intervening petitions and supplemental petitions of the treasurer of Ottawa county in — days from this date.

Thereupon this cause came on to be heard upon the petition and motion of John P. Carrothers, defendant, for leave to file answers to all the several answers and cross-petitions and intervening petitions heretofore filed. On consideration whereof the court do deny said application and motion except that leave is given the said John P. Carrothers to file answers to the several intervening petitions
195 and supplemental intervening petitions of the treasurer of Ottawa county, Ohio, setting up claims for taxes.

Also came the Put-in-Bay Water Works, Light and Railway Company, by its solicitors, without waiving its objections to the jurisdiction of this court, and moves the court for leave to withdraw the answers filed herein on the 24th day of August, 1893, to the answers and cross-petitions of Arbuckle, Ryan and Company, the Railway Equipment Company, and the Cleveland Electrical Manufacturing Company and to the intervening petitions of Brymann Brothers, N. Haughton & Company, Barbour & Starr, Arend Brothers, Frank Hake, and the Bodefield Belting Company for the reasons set out in its motion filed herein on March 1, 1898. On consideration whereof, the court do overrule said motion.

Thereupon said defendant, The Put-in-Bay Water Works, Light and Railway Company, by its solicitors, on its motion and by consent, was given leave to withdraw its answers to the cross-petitions of Arbuckle, Ryan & Company and the Cleveland Electrical Manufacturing Company, the intervening petitions of the Bodefield Belting Company, Barbour and Starr, N. Haughton & Company, Frank Hake, and Breymann Brothers, and file demurrers thereto, which said demurrers were filed, and thereupon this cause came on to be heard upon the demurrers of said defendant, The Put-in-Bay Water Works, Light and Railway Company, to the cross-petitions of Arbuckle, Ryan & Company and the Cleveland Electrical Manufacturing Company, the intervening petitions of the Bodefield Belting Company, Barbour & Starr, N. Haughton & Company, Frank Hake, Breymann Brothers, Bostwick, Braun & Company, Thomas and John J. Barlum, John Hulligan, the intervening petition of the Atlantic Trust Company, and the intervening petition of Marvin W. Hansen against the receiver.

On consideration whereof the court do overrule each and all of said demurrers, to which said defendant water-works, light and rail-

way company excepts, and the court grants leave to said de-
196 fendant company to file answer to said cross-petitions and intervening petitions if it so elect. Whereupon said defendant company declines to file such answers and elects to stand upon its said demurrers.

It appearing to the court that the intervening petitioners Arend Brothers and the cross-petitioners The Railway Equipment Company are not here present and are not represented by counsel, it is ordered that the intervening petition of Arend Brothers and
197 the cross-petition of the Railway Equipment Company be, and the same are hereby, dismissed for want of prosecution at the costs of said intervenors respectively,

And now in open court the Atlantic Trust Company, by its solicitors, moved the court for leave to file answers to the intervening petition of Frank Hake and the intervening petition of N. Haughton & Company, and the court do deny said motion on the ground of laches.

And thereupon this cause came on to be heard upon the cross-petition of Arbuckle, Ryan and Company, and the same being in default for answer, on consideration whereof, and the court, having heard the evidence and arguments of counsel, do find that there is due to the said intervening petitioners, Arbuckle, Ryan and Company, from the said The Put-in-Bay Water Works, Light and Railway Company the sum of eleven thousand one hundred and sixty-three and $\frac{45}{100}$ ($11,163.45) dollars, together with interest thereon from the first day of July, 1892, at the rate of six per cent. per annum.

And this cause coming on further to be heard upon the intervening petition of Barbour and Starr, and the same being in default for answer, on consideration whereof, and the court, having heard the evidence and arguments of counsel, do find that there is due to the said Barbour & Starr from the defendant The Put-in-Bay Water Works, Light and Railway Company the sum of five hundred thirty-eight and $\frac{74}{100}$ dollars, together with interest thereon from the 21st day of June, 1892, at the rate of six per cent. per annum.

And it appearing to the court that no answer has been filed by any of the parties to this cause to the intervening petition of the Atlantic Trust Company, the same is declared to be in default and ripe for a decree for foreclosure and sale; thereupon, on account of the multiplicity of cross-petitioners and intervening petitioners, and the court being of opinion that this is a proper case for the services of a master, it is now here ordered that this cause be, and is hereby, referred to Irvin Belford, who, on account of his experience in such matters, is hereby appointed a special master herein to ascertain and report the amounts due upon the several cross-petitions and intervening petitions herein filed other than the intervening peti-
198 tion of Barbour and Starr and the cross-petition of Arbuckle, Ryan and Company, together with such other facts and data as will enable the court to determine the amounts and priorities of liens of said several claims and demands. The master is also to take testimony as to the amount now due on the trust mortgage of the

Atlantic Trust Company, as set out in its intervening petition, and also the amount to become due on said trust mortgage in case the property covered by said mortgage shall be brought to sale by reason of default in any of the conditions of said mortgage. The master is further ordered to take testimony as to the number and amount of the bonds secured by said trust mortgage given to said Atlantic Trust Company *the* which are now outstanding and valid claims against the property of the defendant The Put-in-Bay Water Works, Light and Railway Company under and by virtue of said mortgage. Said master is also to take testimony as to who are now the owners of the outstanding bonds secured by said Atlantic Trust Company mortgage.

This day came Simon Baruch, and as *amicus curiæ* suggested to the court that the Atlantic Trust Company was not a party to this case, and that the appearance herein of said company has been effected by counsel without any authority to act in that behalf for the said trust company, and further suggesting to the court that he was ready to make the same appear if a master was appointed to take evidence as to the right of counsel to so represent the trust company and bring it into this case—

The court, now being fully advised in the premises, does hold that it will presume the Atlantic Trust Company is represented by counsel authorized by it to enter its appearance in this case as has been done, and does therefore overrule the suggestions of said Simon Baruch and declines to appoint any master, as suggested by him.

199 The Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY CO., a Corporation, &c., Plaintiff,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Co., The Railway Equipment Co., Arbuckle, Ryan & Co., *et al.*, Defendants.

Amended Answer and Cross-bill of Arbuckle, Ryan & Co.

To the judges of the U. S. circuit court:

Arbuckle, Ryan and Company, a copartnership doing business in Ohio, who have been made defendants in said suit, now come and bring this their amended cross-bill and say that on the 27th day of May, 1892, they entered into a written contract with The Put-in-Bay Water Works, Light and Railway Company, whereby they agreed to furnish said Put-in-Bay Water Works, Light and Railway Company certain machinery and perform certain work in accordance with the specifications attached to said contract.

They immediately proceeded to perform the labor and furnish, build, construct, and supply the machinery as in said contract called for, and they in all respects carried out the provisions of said contract.

The work, labor, material, and supplies so by them furnished were

used in the construction of the power-house of the Put-in-Bay Water Works, Light and Railway Company.

The labor and materials furnished and performed by said Arbuckle, Ryan and Company under said contract amounted in price to and were of the value of $16,825.00. In addition thereto there were extras furnished as a part of said work at request of said Put-in-Bay Water Works, Light and Railway Company, which went into the construction of said po-er-house, of the amount and value of $576.85; that there has been paid on said account the sum of $6,248.25, leaving a balance, as agreed upon between said Arbuckle, Ryan & Co. and said Put-in-Bay Water Works, Light and Railway Company at the date of August 1st, 1892, due said Arbuckle, Ryan & Co. of $11,153.60, no part whereof has been paid. A true and correct copy of said contract is hereto attached, marked Exhibit "A," and a true and correct copy of said account is hereto attached, marked Exhibit "B."

200 Said Arbuckle, Ryan & Company further aver that said labor was performed and material furnished in the construction of the power plant as was specified in said contract, and was done in and about and placed upon lots 471, 472, 473, 474, 475, Victory Park addition on Put-in-Bay, or South Bass island, in the township of Put-in-Bay, Ottawa county, Ohio, the property of said defendant, The Put-in-Bay Water Works, Light and Railway Company, at said place.

Said Arbuckle, Ryan & Company further aver that within thirty days from the date of their performing the labor and furnishing materials, as aforesaid, they filed with the recorder of Ottawa county, Ohio, being the county where the labor was performed and the materials were furnished, an affidavit containing an itemized statement of the amount and value of materials and machinery furnished and labor performed, the time when and the place where the same was done and performed, and the amount due therefor after crediting the payments and sets-offs.

Said affidavit also contained an itemized statement of the amount and value of the labor performed and machinery and material furnished. There were no promissory notes given for such labor, machinery, or material, or any part thereof. There was attached to said affidavit a copy of the contract, which is the same as was attached to the original petition, and a copy of said contract is also hereto attached, marked Exhibit "A." Said affidavit and lien were duly recorded by said recorder in a separate book kept therefor.

By said contract there was to be paid plaintiffs the sum of sixteen thousand eight hundred and twenty-five ($16,825.00) dollars at the times and in the amounts following, viz: Two thousand dollars in cash on or not later than May 28th, 1892; twenty-five hundred dollars by June 4, 1892; three thousand nine hundred and twelve $\frac{50}{100}$ dollars as soon as bill of lading was furnished by plaintiffs showing a shipment of the material furnished, mentioned in the specifications attached to the contract, or, provided that onl*t* a part of said material shall be shipped at once, then such proportion of $3,912.50

201 as the amount so shipped shall bear to the entire amount of machinery to be furnished in accordance with the contract

nd specifications. The remainder of said sum of $16,285.00 to be paid when said plant shall be ready for operation and the parties of the first part had completed the contract in accordance with the specifications.

Said affidavit was filed on the 17th day of August, 1892, at 5.05 p. m., and was subsequently recored in a separate book provided for such purpose.

They also aver that within ten days after the filing of the affidavit with the said recorder, as aforesaid, a notice was served in writing upon the secretary of the Put-in-Bay Water Works, Light and Railway Company be delivering to him a notice in writing containing a statement of the fact of their filing such affidavit, the county wherein filed, and materials furnished, as aforesaid.

And so said Arbuckle, Ryan and Company aver that by virtue of the work done and materials furnished by them, as aforesaid, and by the proceedings, as aforesaid, they have obtained a lien upon the property in the petition described and upon the lots and lands aforesaid described and upon the railroad of the defendant The Put-in-Bay Water Works Light and Railway Company prior to any other lien.

They therefore pray, first, that an account be taken of the amount due and owing to them on their claim, as aforesaid; second, that said defendant, The Put-in-Bay Water Works, Light and Railway Company, may be decreed to pay to them the amount aforesaid found due, with the costs, and that your cross-petitioners, Arbuckle, Ryan & Company, may have a lien for the amount so, as aforesaid, found due prior to other liens, and that an order may be made directing the sale of the lots and lands aforesaid, and from the proceeds of said sale the costs of this proceeding be first paid and from the residue thereof the amount then found due and payable to Arbuckle, Ryan & Company, and these petitioners further pray for such further judgment as equity and good conscience may require.

HAMILTON & KIRBY,
Solicitors for said Arbuckle, Ryan & Company.

202 STATE OF OHIO, } ss:
Lucas County, }

J. William Ryan, being duly sworn, says that he is one of the members of the copartnership of Arbuckle, Ryan and Company; that he has read the foregoing amended answer and cross-bill and knows the contents thereof, and that the same are true, as he verily believes.

J. WM. RYAN.

Sworn to before me and subscribed in my presence this 3r- day of April, 1899.

HERBERT T. GREER,
Notary Public in and for Lucas County, Ohio. [SEAL.]

(Endorsement:) In the circuit court of the United States, northern district of Ohio, western division. The Electrical Supply Co., a cor-

poration, etc., plaintiff, *vs.* The Put-in-Bay Water Works, Light & R'y Co. *et al.*, defendants. Filed Apr. 4, 1899. Irvin Belford, clerk. Amended answer & cross-bill of Arbuckle, Ryan & Co. Allowed to be filed on being duly verified. Dated Apr. 1, 1899. H. F. Severens, U. S. judge. Hamilton & Kirby, attorneys.

203 Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *vs.* THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*, Defendants. } No. 1087. In Equity. May 27th.

Motion.

Now comes The Put-in-Bay Water Works, Light and Railway Company, one of the defendants in the above-entitled cause, and respectfully represents to this honorable court:

First. The records of said cause show that one L. K. Parks and one Hiram Van Campen, either as individuals or as a partnership under the firm name of Parks and Van Campen, have at all times since the commencement of said cause represented as solicitors therein Arbuckle, Ryan and Company, an original defendant and a cross-petitioner in said cause.

Second. The records of said cause show that said Arbuckle, Ryan and Company claim and are seeking to establish a lien against the property of said The Put-in-Bay Water Works, Light and Railway Company superior and prior to the lien of the first-mortgage bonds of said defendant.

Third. The records of said cause show that the Atlantic Trust Company, of New York, is the trustee for the holders of said
204 bonds under a certain deed of trust theretofore executed by said defendant prior to the commencement of said cause; that said trustee is not a resident or a citizen of this district or of the State of Ohio; that it is not a defendant in said cause and has never been made a party defendant therein by order of court, service of process, or otherwise.

Fourth. The records of this cause show that heretofore, to wit, early in the year 1898, the said Parks and Van Campen filed in said cause an intervening petition, purporting to be the intervening petition of said trustee, and said Parks and Van Campen therein pretended that they were the solicitors of said trustee and duly authorized to verify and file said intervening petition; that by the filing of the same the appearance of said trustee was pretended to be entered therein, and said trustee was so submitted to the jurisdiction of this honorable court in a cause in which otherwise this court would not have jurisdiction of said trustee.

Fifth. The records of this court show that the claim sought to be enforced and the relief prayed for in said cause by said Arbuckle, Ryan and Company, and the claim sought to be enforced and the

relief prayed for by said intervening petition, purporting, as aforesaid, to be filed on behalf of said trustee, are adverse in interest.

Sixth. It is further respectfully represented upon information and belief that in filing said intervening petition and in verifying
205 the same so, as aforesaid, said Parks and Van Campen acted therein wholly without any right or authority from said trustee.

Seventh. That said intervening petition of the said trustee was filed in said cause by said Parks and Van Campen solely in the interest of said cross-petitioner, Arbuckle, Ryan and Company, for the collusive purpose of bringing said trustee and the bonds and mortgage represented by it within the jurisdiction of this honorable court, to the end that the claim so asserted by said Arbuckle, Ryan and Company may be established as a lien superior and prior to the lien of said bonds and to thus secure an adjudication of matters affecting a party of whom this court would not otherwise have jurisdiction.

Wherefore this defendant moves this honorable court and prays that an order may be entered herein setting aside the decree overruling the demurrer to said intervening petition heretofore made, and striking the said intervening petition of the Atlantic Trust Company from the files of this cause; and your defendant will ever pray.

FORAKER, OUTCALT, GRANGER & PRIOR,
Solicitors for said Defendaat.

(Endorsement:) No. 1087. U. S. circuit court, northern district of Ohio, western division. Electrical Supply Company *v.* Put-in-Bay Water Works, Light and Railway Company. Motion to strike from files. Filed April 14, 1899. Irvin Belford, clerk. Foraker, Outcalt, Granger & Prior.

206 Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*, Defendants.
} In Equity. No. 1087.

Motion on behalf of the Put-in-Bay Water Works, Light and Railway Company to set aside the decree sustaining liens and the order of reference therein entered May 5, 1899.

Comes now The Put-in-Bay Water Works, Light and Railway Company, one of the defendants in the above-entitled cause, and against whose property the liens decreed in said order and decree of May 5, 1899, are sought to be established, and respectfully moves this honorable court to set aside said order and decree for the following reasons:

1st. Because the records of this cause show this honorable court to be without jurisdiction to hear or determine any of the issues involved

therein, and particularly show that this honorable court is without jurisdiction to hear or determine the matters and things referred to in said order and decree of May 5, 1899.

2nd. Because there is pending for hearing in said cause and undetermined a motion filed by this moving defendant previous
207 to the filing and entry of said order and decree of May 5, 1899, in which certain facts are alleged and brought to the notice of this honorable court showing collusive action on the part of the defendants Arbuckle, Ryan and Company, through certain of their attorneys of record herein, for the sole purpose of establishing the lien referred to in said order and decree.

3rd. Because the findings of the court in said order and decree of May 5, 1899, and the decree thereon are clearly erroneous and contrary to the undisputed evidence appearing in the record of said cause.

4th. Because the entry of said decree and order appointing Irvin Bedford, Esq., the clerk of this honorable court, as master to take proof of the claims of the several parties therein referred to and to report his findings thereon to this honorable court was without notice to this moving defendant and without any opportunity being given to appear and protest and object to said appointment.

FORAKER OUTCALT, GRANGER & PRIOR,
Attorneys for Defendant.

(Endorsement:) 1087. United States circuit court, northern dist. of Ohio, western division. The Electrical Supply Co. *vs.* The P. W. W., L. & R'y Co. *et al.* Motion of P. W. W., L. and R'y Co. to set aside order and decree of May 5, 1899. Filed May 27, 1899. Irvin Belford, clerk. Foraker, Outcalt, Granger & Prior, solicitors for def't R'y Co.

207*a* Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Defendants.
} No. 1087. In Equity.

Comes now John P. Carrothers, a defendant in the above-entitled cause, and hereby enters his objection and protest to proceeding with this reference for the reason that there are pending in said cause certain motions which if decided in favor of the movers thereof will render proceedings under this reference unnecessary, and for the reason that the honorable court in making and entering the decree and order of May 5, 1899, in said cause was without jurisdiction so to do, and that the same was made and entered without notice to this defendant and without any opportunity being given him to appear and protest and object to said appointment and proceeding, and also for the reason that this defendant has not been served with any

notice of this hearing whatever, and further objects to the appointment of Irvin Belford as master herein.

JNO. P. CARROTHERS, *In Person.*

(Endorsement:) #1087. United States circuit court, northern dist. of Ohio, western division. The Electrical Supply Co. *vs.* The P. W. W., L. & R'y Co. *et al.* Objections to reference. Filed June 15, 1899. Irvin Belford, clerk.

208 Circuit Court of the United States, Northern District of Ohio, Western Div.

THE ELECTRICAL SUPPLY COMPANY *against* THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.* } Report of Irvin Belford, Special Master.

On the amended answer and cross-bill of Arbuckle, Ryan & Co. and the intervening petition of Barbour & Starr and the answer and cross-petition of the Bodefield Belting Company.

To the honorable the judges of the circuit court of the United States within and for the northern district of Ohio:

In pursuance of a decretal order made and entered in this cause and bearing date of the 5th day of May, 1899, at a stated term of this court, held at Toledo, Ohio, in the said district, by which it was refered to Irvin Belford, a special master, to take proof of the claims of Arbuckle, Ryan & Co., Barbour & Starr, and the Bodefield Belting Company—

I, the said Irvin Belford, special master, as aforesaid, do respectfully report that I have proceeded to investigate the matters so referred to me, and that pursuant to notices duly issued I have been attended by the parties above named and their respective counsel, and that although notice was duly served on the counsel for the Put-in-Bay Water Works, Light and Railway Company they failed and neglected to appear at the hearing of the matters so referred, but the defendant John P. Carrothers, president of said Put-in-Bay Water Works, Light & Railway Co., was present in person, and that after taking due proofs I find and report as follows:

I.

1. By virtue of a written contract, Exhibit A, attached to amended cross-bill, dated May 27th, 1892, between Arbuckle, Ryan & Co. and the Put-in-Bay Water Works, Light and Railway Co., the said Arbuckle, Ryan & Co. performed the labor and furnished the material for the equipment of a certain power-house located on
209 lots 471, 472, 473, 474, and 475 of Victory Park addition, in Put-in-Bay or South Bass island, Ottawa county, Ohio, the property of said The Put-in-Bay Water Works, Light and Railway Company.

2. The first item of labor performed under said contract was on

May 29, 1892, and the work was completed on the 20th day of July, 1892.

3. There is due to said Arbuckle, Ryan & Co. for said work and labor (excluding the item of extras and interest to August 1, 1892, $576.85), as per settlement of August 1, 1892, the sum of $10,576.75, together with interest thereon from August 1st, 1892.

4. Within thirty days from said 20th day of July, 1892, to wit, on the 17th day of August, 1892, at 5 05 o'clock p. m., the said Arbuckle, Ryan & Co. filed with the recorder of Ottawa county, Ohio, being the county where said labor was performed and materials furnished, an affidavit containing an itemized statement of the amount and value of the materials and machinery furnished and labor performed, the time when and the place where the same was done and performed, and the amount due therefor, after crediting the payments and set-offs, and otherwise complied with the requirements of the mechanics' lien laws of the State of Ohio, which said affidavit and lien were duly recorded by the recorder of said Ottawa county, Ohio.

5. On the 25th day of August, 1895, a notice of the filing of such lien, together with a copy thereof, was served on John P. Carrothers, president of said defendant company, by Edward J. Gifford, agent of said Arbuckle, Ryan & Co., and a like notice and copy of lien was served on Frank M. Ohl, secretary of said railway company, on August 25th, 1892, and on J. K. Tillotson, vice-president and general manager of said company, on August 24th, 1892, by Charles W. Ryan, one of the members of the firm of Arbuckle, Ryan & Co.

6. Arbuckle, Ryan & Co. are a copartnership, doing business in the State of Ohio, and the Put-in-Bay Water Works, Light and Railway Company is a corporation for profit, duly organized under the laws of the State of Ohio.

7. The machinery and material so furnished by the said Arbuckle, Ryan & Co. for the Put-in-Bay Water Works, Light and Rail-
210 way Company were used for furnishing light for the Hotel Victory and surrounding grounds and power for running the electric railway running from the dock to the hotel on said island.

II.

I find that Marcus V. Barbour and Rowland Starr on the second day of June, 1892, were a partnership under the firm name of Barbour & Starr, doing business at Toledo, State of Ohio.

In pursuance of a parol contract theretofore made, the said Barbour & Starr, between the dates of June 2nd, 1892, and June 21st, 1892, furnished to said The Put-in-Bay Water Works, Light and Railway Co. the lumber and material itemized in Exhibit "A" attached to their intervening petition for the purpose of building the power-house on lots 471, 472, 273, 474, and 475 of Victory Park addition, Put-in-Bay island, Ottawa county, Ohio, the property of said The Put-in-Bay Water Works, Light and Railway Co. The first item of the account was furnished June 2, 1892, and the last item June 21, 1892.

After deducting all credits and set-offs there is due to said Barbour

& Starr from said The Put-in-Bay Water Works, Light & Railway Co. the sum of $538.74, together with interest thereon from June 21st, 1892.

On October 5, 1892, the said Barbour and Starr made affidavit to their said claim in accordance with the mechanics' lien laws of Ohio for the purpose of obtaining a lien on said premises for the amount due them; said claim, properly attested, was filed with the recorder of Ottawa county, Ohio, on October 6, 1892, and by him recorded in volume 3, pages 14 and 15, of Records of Liens of Ottawa County, Ohio, as shown by Exhibit "A" attached to their intervening petition, introduced in evidence.

III.

The Bodefield Belting Company is a corporation organized under the laws of the State of Ohio and doing business at Cleveland, Ohio.

Under and by virtue of a verbal contract made on the 3rd
211 day of June, 1892, with the Put-in-Bay Water Works, Light and Railway Co., the Bodefield Belting Company furnished material and performed labor in supplying the belting for the engines in the power-house of the Put-in-Bay Water Works, Light & Railway Co., located on lots 471, 472, 473, 474, and 475 of Victory Park addition, Put-in-Bay or South Bass island, Ottawa county, Ohio, as stated in Exhibit "A" attached to the answer and cross-petition of said The Bodefield Belting Company.

The first item of such material was furnished June 28, 1892, and the last item of labor was performed on July 22, 1892. After deducting all credits and set-offs there is due to said The Bodefield Belting Company thereon the sum of $338.11, with interest from September 6, 1892, the date of the rendition of said account.

On the 7th day of September, 1892, the Bodefield Belting Company filed with the recorder of Ottawa county, Ohio, under the statute for obtaining mechanics' liens, an affidavit containing an itemized account of the amount and value of such material and labor, and which said lien is recorded in volume 2, pages 437 and 438, of the Records of Mechanics' Liens of Ottawa County, Ohio.

I return and file herewith the record of the testimony submitted in respect to such matters, together with all exhibits thereto attached.

All of which is respectfully submitted.

IRVIN BELFORD,
Special Master.

(Endorsement:) No. 1087. United States circuit court, northern district of Ohio, western division. The Electrical Supply Co. against The Put-in-Bay Water Works, Light & Railway Co. *et al.* Report of Irvin Belford, special master. Filed Jun- 19, 1899. Irvin Belford, clerk.

211*a* December Term, A. D. 1899, to wit, December 11, 1899.

Present: The Honorable Horace H. Lurton, U. S. circuit judge; Honorable Henry F. Severens, U. S. district judge, sitting by designation.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Defendants.
} #1087. In Equity. Order.

On motion of the defendant Atlantic Trust Company, it being made to appear to the satisfaction of the court that the order and direction of this court made on the 31st day of January, 1899, overruling the demurrer of the defendant The Put-in-Bay Water Works, Light and Railway Company to the intervening petition of the defendant Atlantic Trust Company, filed in this cause on the 22nd day of November, 1898, which order the court remembers to have then made, has inadvertently been omitted from the journal of this court, it is therefore ordered by the court that said order so made be entered by the clerk of the court *nunc pro tunc* as of said January 31st, 1899, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant.
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Defendants.
} #1087. In Equity. Order.

This cause coming on further to be heard upon the demurrer of the defendant The Put-in-Bay Water Works, Light and Railway Company to the intervening petition of Atlantic Trust Company, filed herein November 22nd, 1898, after argument of counsel thereon, the court, being fully advised in the premises, overrules said demurrer.

211*b* December Term, A. D. 1899, to wit, December 11, 1899.

Present: The Honorable Horace H. Lurton, U. S. circuit judge; Honorable Henry F. Severens, U. S. district judge, sitting by designation.

THE ELECTRICAL SUPPLY COMPANY, Complainants,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.*, Defendants.
} #1087. In Equity. Order.

This matter coming on further to be heard upon the motion of the defendant The Put-in-Bay Water Works, Light and Railway

Company for an order setting aside the decree overruling the demurrer to said intervening petition of Atlantic Trust Company and striking the said intervening petition from the files of this cause, the court, being fully advised in the premises, overrules the said motion.

212 December Term, A. D. 1899, to wit, December 12, 1899.

Present: The Honorable Horace H. Lurton, U. S. circuit judge; Honorable Henry F. Severens, district judge, sitting by designation.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company, Defendants. } # 1087. In Equity.

It appearing to the court that there has been filed in this cause no plea or answer to the intervening petition of the defendant Atlantic Trust Company or to its amendment thereto, and that each and every of the defendants and the complainant are in default thereof: Now, therefore, on this 12th day of December, 1899, came the said Atlantic Trust Company, by its solicitors, H. Van Campen, Jr., and Swayne, Hayes and Tyler, and, on its motion, it is ordered that the said intervening petition and amendment thereto be taken *pro confesso* as to all parties to this action, reserving, however, to the defendant The Bodefield Belting Company, without further pleading herein, the right to present for the further consideration of the court and its orders thereon all or any question as to the priority of the lien claimed by said The Bodefield Belting Company over the said lien of said Atlantic Trust Company.

And it appearing that a reference should be had for the taking of proofs touching the ownership of the mortgage bonds mentioned and referred to in said intervening petition and amendment and the number and amount thereof issued and outstanding, together with the several dates of the sales thereof and the amount of principal and interest due thereon, it is now here ordered that Irvin Belford, Esq., the said Belford having special qualifications therefor, be, and he is hereby, appointed special master in this cause to take testimony and report the same to this court, together with his findings of fact thereon, and to ascertain and report to the court as soon as he conveniently may be enabled so to do—

213 First. The number of bonds issued and sold by said The Put-in-Bay Water Works, Light and Railway Company and secured by the mortgage or deed of trust described in the said intervening petition and the amendment thereto.

Second. The several dates at which the said bonds were respectively issued and sold, by whom sold, and the number thereof now outstanding and unpaid.

Third. The names of the several owners and holders thereof, the number of said bonds held by each owner or holder and their several interests therein, and the amount due and unpaid on the bonds so held by them respectively, both of principal and interest.

It is further ordered that before taking testimony herein the said master shall cause notice to be published once a week for four weeks in the Toledo Blade, a newspaper of general circulation within this district, and mail notices to the Atlantic Trust Company and to each of the persons known who claim to own any of said bonds at least two weeks prior to the time fixed for hearing, appointing a time and place within this district for said hearing, and requiring each and every person having or claiming any ownership of or interest in said bonds or in any thereof to appear at said hearing and there set up and assert such ownership or interest; and it is further ordered that participation in the distribution of any fund to be derived from any sale of the property conveyed or mortgaged by the mortgage or deed of trust described in said intervening petition shall be confined to such persons as shall appear at said hearing and in accordance with their several interests therein, as determined by said master, unless for good cause shown it shall be hereafter otherwise ordered by the court.

214 December Term, A. D. 1899, to wit, December 13, 1899.

Present: The Honorable Horace H. Lurton, U. S. circuit judge; Honorable Henry F. Severens, U. S. district judge, sitting by designation.

THE ELECTRICAL SUPPLY COMPANY
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY Company *et al.* } Orders.

On this 13th day of December, 1899, came on to be heard the motion of the Railway Equipment Company to reinstate the answer and cross-petition heretofore, to wit, at the January term, 1898, dismissed, and was argued by counsel; whereupon, on consideration by the court, it is ordered, adjudged, and decreed by the court that said motion be, and the same is hereby, denied.

On the same day this cause came on further to be heard on the motion of the Put-in-Bay Water Works, Light and Railway Company to set aside the order and decree of this court made May 5th, 1899, by which it was referred to Irwin Belford, Esquire, special master, to take proof of the claims of Arbuckle, Ryan and Company, Barbour and Starr, and the Bodefield Belting Company, and was submitted to the court on the arguments of counsel, and the court, being fully advised in the premises, on consideration whereof, does deny said motion.

Thereupon this cause came on further to be heard on the separate applications of Arbuckle, Ryan & Company, Barbour & Starr, and the Bodefield Belting Company to confirm the report of Irwin Belford, Esquire, special master, heretofore, to wit, on the 19th day of June, 1899, filed in this cause, and for decree thereon, and was submitted to the court upon the arguments of counsel; on consideration whereof by the court the same is in all things confirmed.

Whereupon it is ordered, adjudged, and considered that the said

port of the said Irwin Belford, Esquire, special master in this cause, , and the same is hereby, in all respects confirmed, and it is or- red that a decree be entered in all respects in accordance with the finding of said special master in said report.

15 It is further ordered that Irwin Belford, Esquire, special master, be allowed the sum of $75 for his services in that be- alf, and that there further be allowed to George A. Bassett the sum f $32.00 and to James H. Emery the sum of $13.20 for services as enographers in taking testimony in said hearing, which various mounts are ordered to be taxed as part of the costs in this case.

It is accordingly ordered, adjudged, and decreed that said Ar- uckle, Ryan & Company has a valid and subsisting lien on the laims set out in their amended intervening petition for the sum of 10,576.75, together with interest thereon from August 1st, 1892, which lien begins and takes effect from the 27th day of May, 1892, nd is established as a lien upon that portion of the property of the defendant The Put-in-Bay Water Works, Light and Railway Com- pany known as the power-house, being lots numbers 471, 472, 473, 474, and 475 of Victory Park addition, in Put-in-Bay or South Bass sland, Ottawa county, Ohio, together with the buildings situate on said lots and the fixtures, the plant, machinery, apparatus, and ap- purtenances thereto and thereon; also that Marcus V. Barbour and Rowland Starr, a partnership under the firm name of Barbour & Starr, have a lien, in accordance with the prayer of their intervening petition, on said above-described property for the sum of $538.74, together with interest from June 21st, 1892, and their costs herein expended, which lien dates and takes effect from June 2nd, 1892; also that the Bodefield Belting Company, a corporation organized under the laws of the State of Ohio, has a lien upon said above- described premises, in accordance with the prayer of its intervening petition, for the sum of $338.11, with interest from September 6th, 1892, together with its costs herein expended, which lien dates and takes effect from June 28th, 1892.

216 December Term, A. D. 1899, to wit, December 14, 1899.

Present: The Honorable Horace H. Lurton, U. S. circuit judge.
Present: The Honorable H. F. Severens, district judge, sitting by designation.

ELECTRICAL SUPPLY COMPANY
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND Railway Company *et al.* } # 1087. In Equity.

This matter coming on further to be heard this day on the appli- cation of Walker P. Hall for an order by this court directing the receiver herein to pay out of the funds in his hands such sums as the court might deem proper to be applied in payment upon the re- ceiver's certificates heretofore issued under the orders of this court, the court, being fully advised in the premises, does grant said appli- cation.

It is therefore ordered by the court that the receiver herein be, and he is hereby, directed, out of the funds in his hands, to pay to said Walker P. Hall the sum of $1,853.94 and to E. J. Dodge the sum of $122.07, which said sums, together with the sum of $1,925.00 heretofore received by the said Walker P. Hall under the terms of the former order of the court, the court finds fully liquidates and pays all interest upon the several certificates heretofore issued and now outstanding, computed to the date of this order, to wit, December 13, 1899.

217 December Term, A. D. 1899, to wit, December 15, 1899.

Present: The Honorable Horace H. Lurton, U. S. circuit judge; Honorable Henry F. Severens, district judge, sitting by designation.

THE ELECTRICAL SUPPLY COMPANY
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY *et al.* } Decree.

It being made to appear to the court that there is now past due and unpaid on the receiver's certificates heretofore issued under the order and direction of the court in this case the sum of $7,996.10, which amount represents the balance due on all of said certificates now outstanding up to this date and shall bear interest hereafter at seven per cent., all of which certificates have been deposited with the clerk of this court, and which amount and the costs of this case taxed and taxable against the defendant The Put-in-Bay Water Works, Light and Railway Company, to wit, the sum of $—, the court finds are the first and best lien on all the property of the said defendant, The Put-in-Bay Water Works, Light and Railway Company, and there being no income or moneys available in the hands of the receiver sufficient to provide for the payment of said certificates and costs, it is accordingly ordered, adjudged, and decreed that unless said defendant or some party in interest pay or cause to be paid to the clerk of this court the amounts so as aforesaid found due for receiver's certificates and the costs, as aforesaid, together with the sum of $15,033.44, being the amount due as found by this court in a prior order in this case on the amended intervening petition of Arbuckle, Ryan & Company, with interest computed to the date of this decree, and the sum of $784.85, being the amount found due in a prior order of this court on the intervening petition of Barbour & Starr, with interest computed to the date of this decree, and the sum of $486.88, being the amount found due in a prior order of this court on the intervening petition of the
218 Bodefield Belting Company, with interest computed to the date of this decree, within thirty days from the date of this decree, all of the property of the defendant The Put-in-Bay Water Works, Light and Railway Company, hereinafter more specifically described, and all the right, title, and interest and equity of redemption of said defendant, The Put-in-Bay Water Works, Light and Railway Company, and each and every party to this action in

to the said property and in and to all property which has since the date of the filing of the petition herein been acquired by said The Put-in-Bay Water Works, Light and Railway Company or by the receiver appointed by this court or which may hereafter be acquired prior to the sale hereinafter provided for shall be offered for sale and sold by and under the direction of Mathias A. Smalley, who is hereby appointed special master for the purpose, in the manner hereinafter directed, to satisfy the amounts due, as aforesaid, for said receiver's certificates and costs, and also to satisfy the amounts found due, as aforesaid, on the amended intervening petition of Arbuckle, Ryan & Company and the intervening petitions of Barbour & Starr and the Bodefield Belting Company, and that the property ordered to be sold under this decree shall be sold in accordance with the course and practice of this court at public sale to the highest bidder for cash, at the court-house of Ottawa county, Ohio, at Port Clinton, in said county, being the county in which said property is situate, and that notice of the time and place of such sale shall be given by said Mathias A. Smalley, special master, as aforesaid, by advertisement thereof published once a week for at least four weeks prior to said sale in at least one newspaper printed, regularly issued, and having a general circulation in said Ottawa county, which said notice shall describe the property to be sold.

It is further ordered, adjudged, and decreed that the said special master in making such sale shall first offer for sale all the right, title, and interest of the defendant The Put-in-Bay Water Works, Light and Railway Company in and to the railroad, so called, of the said defendant, The Put-in-Bay Water Works, Light and Railway Company, including therein the line of railway, cars, motors,

apparatus, tracks, side tracks, switches, turnouts, poles, wires,

219 and other apparatus, together with the franchises, easement, and rights of way connected therewith or appurtenant thereto, not part of, however, or belonging to the power-house property, so called, hereinafter described, provided that no bids for said above-described property, when thus offered separately, shall be received for less than a sum equal to the amounts found due, as aforesaid, upon receiver's certificates and the costs hereinabove provided, and provided further, however, and it is hereby ordered, that if within thirty days from the date of this decree the said defendant, The Put-in-Bay Water Works, Light and Railway Company, or any party in interest herein, pay or cause to be paid to the clerk of this court the amount so, as aforesaid, found due on said receiver's certificates, together with the costs of this action, as hereinbefore adjudged, then said marshal shall not expose or offer for sale under this decree the railroad property as above described. In case said railroad property, so called and above described, shall be separately offered for sale under the above terms of this decree and the amount bid therefor shall equal the amount of said receiver's certificates and costs aforesaid, then said special master shall sell the aforesaid property to the highest and best bidder therefor, and thereupon shall next offer for sale and sell to the highest and best bidder for cash all the right, title, and interest of the defendant The Put-in-Bay Water Works, Light

and Railway Company in and to the remainder of the property of the said The Put-in-Bay Water Works, Light and Railway Company, to wit, the power-house property, so called, being lots numbers four hundred and seventy-one (471), four hundred and seventy-two (472), four hundred and seventy-three (473), four hundred and seventy-four (474), and four hundred and seventy-five (475) of Victory Park addition, in Put-in-Bay or South Bass island, Ottawa county and State of Ohio, together with all the buildings and appurtenances thereon, including the plant, machinery, apparatus, and fixtures attached to or contained in said buildings or either of them, provided that no bid for said power-house property as above described shall be received for less than $10,000.00.

220 It is further ordered that if in accordance with the terms of this decree, as hereinabove set forth, separate offer of the aforesaid railroad company, so called and as hereinabove described, shall be made, and the sum bid therefor shall not, however, be equal to the amount found due, as aforesaid, upon said receiver's certificates and the costs aforesaid, then separate sale thereof shall not be made, but in lieu of said offer of the remainder of the property of said defendant, The Put-in-Bay Water Works, Light and Railway Company, as provided by the terms of this decree hereinabove set forth, said special master shall forthwith offer for sale and sell for cash to the highest and best bidder therefor all the property of the said defendant, The Put-in-Bay Water Works, Light and Railway Company, above described, including both the railroad property, so called, and the power-house property, so called, as hereinabove described, as a unit, but no bid therefor as a unit shall be received for less than $16,500.00.

It is further ordered, adjudged, and decreed that the said special master return the proceeds of said or any of said sales into the registry of this court to be there held subject to the further order of this court.

It is further ordered and directed that the said special master make report of his acts and doings under this decree with all convenient speed after said sale or sales shall have taken place.

The court hereby reserves for further consideration as between Atlantic Trust Company and the Bodefield Belting Company any and all questions arising between them as to the priority of their respective liens, and the court further expressly reserved for its further consideration all matters not herein expressly provided for.

Dated this 13th day of December, A. D. 1899.

[Endorsed:] 1087. United States circuit court, northern dist. of Ohio, western division. The Electric Supply Co., complainant, vs. The P. W. W., L. & R'y Co. *et al.*, respondents. Decree and order of sale. Entered Dec. 15th, 1899.

221 (Entered) Saturday, March 10, 1900.

THE ELECTRICAL SUPPLY COMPANY
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY Company *et al.* } Order.

The report of M. A. Smalley, Esquire, special master in chancery, appointed by the court in this cause, having been filed in this court on the 2nd day of March, 1900, showing that on the 24th day of February, 1900, at the hour of one o'clock of said day, he sold at public auction to J. W. and C. W. Ryan, for the sum of sixteen thousand five hundred and one ($16,501.00) dollars, all the property of the said defendant, The Put-in-Bay Water Works, Light and Railway Company, specifically mentioned and described in the decree of the court in the above-entitled cause entered on the 15th day of December, 1899.

Now, on this 8th day of March, 1900, the court, having fully considered and examined the report of said master, and it appearing to the court that said sale was duly and regularly made by said master in accordance with law, the course and practice of this court, and in the manner provided by said decree, the court, being fully advised in the premises, and motion having been duly made by the purchasers of said property that the said report of the said master and the said sale made by him, as set forth in said report, be approved—

It is now accordingly ordered, adjudged, and decreed that unless good cause is shown against it within eight days from the entry hereof and notice of such entry the said report of the said master and the said sale made by him, as set forth in his said report, be, and the same shall be, approved and confirmed, and unless, as aforesaid, good cause is shown against it, it is further ordered, adjudged, and decreed that proper and legal conveyance of all of the property so sold shall be made and are hereby directed to be made to the said purchasers, J. W. and C. W. Ryan, in the manner and by the parties provided for by the decree of this court made and entered herein on the 15th day of December, A. D. 1899.

(Endorsed:) Approved for entry. H. F. Severens, U. S. dist. judge, under designation.

222 (Entered) Monday, March 26, 1900.

THE ELECTRICAL SUPPLY COMPANY, Plaintiff,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY Company *et al.*, Defendants. } Order.

It appearing to the court that all the parties herein have had notice of the order *nisi* entered on the 10th day of March, A. D. 1900, approving the proceeding of the special master and confirming the sale of the property ordered to be sold under previous decrees of this court herein and no exceptions or objections to the sale

having been filed by any of said parties, it is now ordered that the said order confirming said sale be, and the same is hereby, made absolute and the special master directed to immediately execute a deed for the property so sold by him to the purchasers.

(Endorsed:) The within order is approved for entry. Dated March 26, 1900. H. F. Severens, circuit judge.

223 June Term, A. D. 1900, to wit, June 8, 1900.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

THE ELECTRICAL SUPPLY COMPANY, Complainant, *against* THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*, Defendants. | No. 1087. In Equity. Decree.

This day came Arbuckle, Ryan & Company, The Bodefield Belting Company, Barbour & Starr, The Put-in-Bay Water Works, Light & Railway Company, Walker P. Hall, L. S. Baumgardner, receiver, and Atlantic Trust Company, by their respective counsel, and thereupon this cause was heard upon the motion of Walker P. Hall for an order releasing the bond by him heretofore given conditioned for the repayment of any moneys by him received from the receiver herein should he be ultimately found not entitled thereto.

In consideration whereof the court, being duly advised in the premises, doth find that the condition of said bond has been fully satisfied, and that the same should be cancelled and discharged, but retained in the custody of the court.

It is therefore ordered and adjudged by the court that said bond be, and the same hereby is, cancelled and discharged, and the said Walker P. Hall and his surety are hereby released from any and all liability thereon.

And thereupon this cause was further heard upon the motion of the said Walker P. Hall for an order of the court directing the clerk to pay the said Walker P. Hall out of the moneys in the registry of the court and arising from the sale of the property of said defendant, The Put-in-Bay Water Works, Light and Railway Company, the sum of $2,400.00, claimed to have been paid by him on the 28th day of July, 1894, to said L. S. Baumgardner, as receiver, in liquidation of the allowances theretofore made said receiver and his counsel, together with certain expenditures by said receiver made, and was argued by counsel.

In consideration whereof the court, being duly advised in
224 the premises doth find that said motion is not well taken and should be denied.

It is therefore ordered and adjudged by the court that said motion be, and the same hereby is, overruled at the costs of said Walker P. Hall.

Thereupon this cause was further heard upon the fifth and final

report of said receiver, L. S. Baumgardner, heretofore appointed herein, and was submitted to the court.

In consideration whereof and upon examination thereof the court finds the same to be, in all respects, true and correct, and it is therefore ordered and adjudged by the court that the same be, and it is hereby, approved and confirmed.

And the court doth further find that all the property of the said defendant, The Put-in-Bay Water Works, Light & Railway Company, has been sold and delivered to the purchaser thereof, and that there is no further need for a receiver herein.

The court does further find that said receiver and his counsel, Doyle & Lewis, have performed valuable services in the care and preservation of the property of said defendant since the last allowance made them herein. It is therefore ordered and adjudged by the court that out of the funds in his hands said receiver be allowed, and he is hereby authorized to pay unto himself, in full of his compensation for such services, the sum of $200; to Doyle & Lewis, his said counsel, the sum of $300, in full payment for the services rendered him as such receiver, and to the clerk of this court the balance remaining in his hands, to wit, the sum of $269.18, to be applied by said clerk in part payment of the costs herein incurred.

It is further ordered and adjudged by the court that upon making said payment of said sum to said clerk, and upon filing with the clerk of this court proper receipts, evidencing the disbursements by him made, as set forth in his said final account, said receiver shall stand discharged from all further duties and obligations as such receiver, and that the condition of said bond by him heretofore filed herein as such receiver be satisfied and said receiver and his surety be relieved from all liability thereon.

225 And thereupon this cause was further heard upon the petition of Arbuckle, Ryan & Company, one of the intervenors herein, for an order of the court distributing the proceeds arising from the sales of the property of the Put-in-Bay Water Works, Light & Railway Company, heretofore made in accordance with the former order of this court, and was argued by counsel.

In consideration whereof the court, being duly advised in the premises, doth find that the prayer of said petition should be granted.

It is therefore ordered and adjudged by the court that the clerk of this court be, and he hereby is, ordered and directed to forthwith distribute the moneys now in the registry of the court and arising from said sales aforesaid in the following manner, to wit:

I. To the clerk of this court the costs of this suit and remaining unpaid, including the sum of $175.00 to the special master commissioner hereby allowed as his compensation for his services by him rendered in selling said property, and the further sum of $54.30, hereby allowed him for the expenses and expenditures by him incurred in connection therewith, which said amounts shall be paid said master commissioner.

II. To the owner or owners of receiver's certificates, heretofore issued herein, upon the surrender and cancellation thereof, the

amount heretofore found to be due thereon, to wit, $7,966.10, together with interest thereon, at the rate of 7% per annum, from the 13th day of December, 1899, to the date when this order shall finally take effect.

III. To the county treasurer of the county of Ottawa and State of Ohio the sum of $591.66, being the taxes and assessments levied and assessed against the property of said The Put-in-Bay Water Works, Light & Railway Company for the year 1899.

IV. 100/165 part of the balance remaining to Arbuckle, Ryan & Company, the Bodefield Belting Company, and Barbour & Starr, *pro rata*, in proportion to the amounts heretofore found due them respectively.

226 The balance, after the payments aforesaid, to wit, the sum of $—, shall be retained in the registry of the court to await its further and final order.

And thereupon this cause was further heard, upon the motion of the Atlantic Trust Company, trustee, for leave to withdraw its petition filed herein for allowance of compensation; which leave is given, and the same is accordingly done, without prejudice, however, to the right of said trustee to hereafter file its petition therefor.

To all the foregoing order and decree the said The Put-in-Bay Water Works, Light and Railway Company, by its counsel, excepts on the ground that the court is without jurisdiction in the premises, for the reason that it appears by the record herein that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, and the parties to said suit were improperly and collusively joined for the purpose of creating a case cognizable by said circuit court under the act of Congress of March 3, 1875, as to which question of jurisdiction an appeal has been taken by the said The Put-in-Bay Water Works, Light and Railway Company to the Supreme Court of the United States, at Washington.

227 United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, a Corporation, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMpany, a Corporation; The Railway Equipment Company, a Corporation; Charles W. Ryan and J. William Ryan, Surviving Partners of the Former Partnership Known as Arbuckle, Ryan and Company; The Arbuckle-Ryan Company, a Corporation; James K. Tillotson; The Cleveland Electrical Manufacturing Company, a Corporation; The Industrial and Mining Guaranty Company, a Corporation; John P. Carrothers; Hulbert H. Warner; Marcus V. Barbour and Rowland Starr, Partners under the Firm Name of Barbour and Starr; The Bodefield Belting Company, a Corporation; Walker P. Hall; E. J. Dodge, Whose First Name is Unknown; Frank Holt, Treasurer of Ottawa County, Ohio; The Atlantic Trust Company, a Corporation, and Leander S. Baumgardner, Respondents.

Petition on Appeal.

The above-named respondent, The Put-in-Bay Water Works, Light and Railway Company, conceiving itself aggrieved by the final decrees made and entered in the above-entitled cause at the December term, 1899, by said circuit court of the United States, in and for the northern district of Ohio, western division, to wit, the final decree made and entered on the 12th day of December, 1899, wherein and whereby a judgment *pro confesso* was rendered upon the intervening petition of the Atlantic Trust Company, and the final decrees made and entered respectively on the 13th and 15th days of December, 1899, wherein and whereby the report of Irvin Belford, Esq., special master, allowing the claims of Arbuckle, Ryan and Company, so called; Marcus V. Barbour and Rowland Starr, partners, doing business as Barbour and Starr, and the Bodefield Belting Company, was confirmed, and the outstanding receiver's certificates and the said claims of Arbuckle, Ryan and Company, so called; Marcus
228 V. Barbour and Rowland Starr, partners, doing business as Barbour and Starr, and the Bodefield Belting Company were decreed to be a lien on all the property of the Put-in-Bay Water Works, Light and Railway Company, and ordering the payment of the same and the sale of said property in default of payment; and also conceiving itself aggrieved by the several rulings, orders, and decrees made and entered by said circuit court in said cause prior and subsequest to said final decrees, all as fully set forth and complained of in the assignment of errors filed herewith, doth hereby appeal to the United States Supreme Court from said final decrees upon the sole ground that said circuit court had no jurisdiction to entertain said cause or to proceed therein, and had no jurisdiction to make said final decrees and other orders and decrees aforesaid.

Wherefore your petitioner the Put-in-Bay Water Works, Light

and Railway Company doth hereby pray that this petition for its said appeal may be allowed, and that a transcript of such part of the record, proceedings, and papers upon which said orders and decrees were made as will show the jurisdictional question upon which this petition was prayed, duly authenticated, may be sent to the United States Supreme Court at Washington.

JOSEPH B. FORAKER,
WALTER L. GRANGER,
Solicitors for The Put-in-Bay Water Works, Light and Railway Company, Appellant.

(Endorsement:) 1087. United States circuit court, northern district of Ohio, western division. The Electrical Supply Company v. The Put-in-Bay Water Works, Light & Railway Co. *et al.* Petition on appeal. Filed Jun- 2, 1900. Irvin Belford, clerk.

229 United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, a Corporation, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY Company, a Corporation; The Railway Equipment Company, a Corporation; Charles W. Ryan and J. William Ryan, Surviving Partners of the Former Partnership Known as Arbuckle, Ryan and Company; The Arbuckle-Ryan Company, a Corporation; James K. Tillotson, The Cleveland Electrical Manufacturing Company, a Corporation; The Industrial and Mining Guaranty Company, a Corporation; John P. Carrothers, Hulbert H. Warner, Marcus V. Barbour and Rowland Starr, Partners under the Firm Name of Barbour and Starr; The Bodefield Belting Company, a Corporation; Walker P. Hall, E. J. Dodge, Whose First Name is Unknown; Frank Holt, Treasurer of Ottawa County, Ohio; The Atlantic Trust Company, a Corporation, and Leander S. Baumgardner, Respondents. } No. 1087.

Assignment of Errors.

And now comes the said respondent, The Put-in-Bay Water Works, Light and Railway Company, and files the following assignment of errors upon which it will rely for its appeal to the United States Supreme Court from the final decrees made by said circuit court at its December term, 1899, in the above-entitled cause:

230 I. The said circuit court erred in making and entering its certain decree December 12, 1899, wherein and whereby a judgment *pro confesso* was rendered against this respondent on the intervening petition of the Atlantic Trust Company.

II. The said circuit court erred in making and entering its cer-

tain decrees on December 13th and 15th, 1899, respectively, confirming the report of Irvin Belford, Esq., special master, which allowed the claims of Arbuckle, Ryan and Company, so styled, Marcus V. Barbour and Rowland Starr, partners as Barbour and Starr, and the Bodefield Belting Company against this respondent and decreeing that the said claims and the outstanding receiver's certificates were liens upon this respondent's property and ordering the payment of the same or, in default of payment, the sale of said property.

III. The said circuit court erred in making and entering its decree on the 26th day of March, 1900, confirming the sale of said property.

IV. The said circuit court erred in making and entering its decree of December 14, 1899, ordering the payment to Walker P. Hall of $1,853.94 and to E. J. Dodge, so styled, $122.07 in satisfaction *pro tanto* of receiver's certificates held by them.

V. The said circuit court erred in making and entering its order of May 5, 1899, overruling the demurrers of this respondent to the cross-bill of Arbuckle, Ryan and Company, so styled, and to
231 the intervening petitions of Marcus V. Barbour and Rowland Starr, partners as Barbour and Starr, and the Bodefield Belting Company.

VI. The said circuit court erred in making and entering its order of January 31, 1899, overruling the demurrer of this respondent to the intervening petition of the Atlantic Trust Company.

VII. The said circuit court erred in making and entering its order of April 6, 1898, denying the petition of this respondent for an order dismissing this suit.

VIII. The said circuit court erred in making and entering its order of July 15, 1896, denying the petition of this respondent for an order dismissing this suit.

IX. The said circuit court erred in making and entering its order of June 5, 1896, overruling the motion of this respondent for an order dismissing this suit.

X. The said circuit court erred in making and entering its order of June 12, 1894, overruling the motion of this respondent to dismiss this suit.

XI. The said circuit court erred in making and entering its order of September 10, 1892, appointing a receiver herein and in making and entering its order of December 22, 1892, refusing to discharge said receiver.

232 XII. The said circuit court erred in its order made and entered October 15, 1892, and in its further order made and entered December 22, 1892, authorizing the receiver to issue and dispose of certificates of indebtedness and declaring same to be a lien upon the property of this respondent.

XIII. The said circuit court erred in entering and making its several orders directing the payment and distribution of the funds and moneys accruing in this suit and arising from the earnings of this respondent's property during the progress of this suit, amounting in the aggregate to more than $10,000.00.

XIV. The said circuit court erred in proceeding further in this

suit and in failing and refusing to dismiss the same and in making the several rulings, orders, adjudications, and decrees shown by the record to be transmitted herewith after the 26th day of September, 1892.

And coming now to allege the reason for each and all of the several errors above assigned, this respondent says that the said circuit court erred in all of said rulings, orders, adjudications, and decrees for the reason, to wit, that on and at all times after the said 26th day of September, 1892, it appeared by the record of the proceedings herein that this suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the said circuit court,
233 and that the parties to said suit had been improperly and collusively made and joined for the purpose of creating a case cognizable by said circuit court under the act of Congress of March 3, 1875, and because it also appeared by the record of said proceedings herein and after said date that the subject-matter of the controversy at the time of the institution of this suit and the appointment of a receiver herein was already pending in the common pleas court of Ottawa county, Ohio, a court of competent jurisdiction in the premises, and the said property was then and there under the jurisdiction and control of said State court, and that the institution of this suit and the proceedings of the said circuit court herein were such an interference with the jurisdiction of the said common pleas court of Ottawa county, Ohio, as is prohibited by the law and the statutes of the United States.

In order that the foregoing assignment of errors may be and appear of record, said respondent presents the same to the said circuit court and prays that such disposition be made thereof as in accordance with the law and the statutes of the United States in such cases made and provided, and said respondent prays a reversal of the decrees and orders made and entered by the said circuit court which are complained of and mentioned in the above assignment of errors.

JOSEPH B. FORAKER,
WALTER L. GRANGER,
Solicitors for the Respondent The Put-in-Bay Water Works, Light and Railway Company.

234 (Endorsement:) No. 1087. U. S. circuit court, northern district of O., western division. The Electrical Supply Co. vs. The Put-in-Bay Water Works, Light & Railway Co. *et al.* Assignment of errors. Filed Jun- 2, 1900. Irvin Belford, clerk.

235 (Entered) Saturday, June 2, 1900.

THE ELECTRICAL SUPPLY CO., a Corporation, Complainant.
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY Company *et al.*, Respondents. } # 1087.

Order Allowing Petition on Appeal and Certificate of the Jurisdictional Question Involved.

The former appeal prayed by the above-named appellant, The Put-in-Bay Water Works, Light and Railway Company, and allowed by me on the 23rd day of February, 1900, having been discontinued, and the said appellant having now presented a new petition praying for the allowance of an appeal from the decrees of this court made on the 12th, 13th, and 15th days of December, 1899, said petition is now granted and the appeal is allowed.

And thereupon, on the request of Walter L. Granger, of counsel for the appellant, I do hereby certify to the Supreme Court of the United States that upon the hearing of the said cause, wherein the said decrees so appealed from were entered, as well as upon various interlocutory hearings during the progress of the cause, the said appellant denied the jurisdiction of the court over said cause and contended that the court was without jurisdiction upon the grounds that the amount in controversy was in truth and in fact much less than the sum of two thousand dollars ($2,000.00), exclusive of interest and costs, and that the case had been fraudulently and collusively instituted by the parties thereto for the purpose of creating the appearance of jurisdiction not in fact existing; which contention, so far as related to the receiver's certificates and the intervening petitions, was overruled.

And it is accordingly certified that the appeal herein allowed is granted for the single purpose of presenting to the said Supreme Court the question whether the circuit court had jurisdiction to entertain the said cause and render the decrees so appealed from.

236 The clerk is therefore directed to certify to the United States Supreme Court, at Washington, the portions of the record in said cause appertaining to said jurisdictional question upon the appellant executing a bond for costs in the sum of five hundred dollars ($500.00).

H. F. SEVERENS,
Circuit Judge.

Dated June 1st, 1900.

237 United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY *et al.*, Respondents. } No. 1087.

Bond on Appeal.

Know all men by these presents that we, the Put-in-Bay Water Works, Light and Railway Company, a corporation created and existing under the laws of Ohio, as principal, and the American Bonding and Trust Company of Baltimore City, Maryland, a corporation created and existing under the laws of Maryland, as surety, are held and firmly bound unto Charles W. Ryan and J. William Ryan, surviving partners of the former partnership known as Arbuckle, Ryan and Company, and unto the Arbuckle and Ryan Company, a corporation; Marcus V. Barbour and Rowland Starr, partners as Barbour and Starr; the Bodefield Belting Company, corporation; Walker P. Hall, E. J. Dodge, so styled in said above-named cause; Leander S. Baumgardner, the Atlantic Trust Company, a corporation, and Frank Holt, treasurer of Ottawa county, Ohio, in the full sum of five hundred dollars ($500.00), to be paid to said parties, jointly or severally, their executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these presents.

Sealed with our corporate seals and dated this 31st day of May, in the year of our Lord one thousand nine hundred.

238 Whereas lately, at a session of the circuit court of the United States for the northern district of Ohio, western division, in a suit in equity pending in said court, numbered on the docket as No. 1087, wherein The Electrical Supply Company, a corporation, was complainant, and, among others, the said The Put-in-Bay Water Works, Light and Railway Company, a corporation; Arbuckle, Ryan and Company, so styled, and since then succeeded by the Arbuckle and Ryan Company, a corporation, were respondents, and Marcus V. Barbour and Rowland Starr partners as Barbour and Starr; The Bodefield Belting Company, a corporation; Walker P. Hall, E. J. Dodge, so styled; The Atlantic Trust Company, a corporation, and Frank Holt, treasurer of Ottawa county, Ohio, were intervening defendants, and Leander S. Baumgardner was appointed and acted as receiver, certain final decrees were rendered against the said The Put-in-Bay Water Works, Light and Railway Company and the sale of its property was ordered; and the said The Put-in-Bay Water Works, Light and Railway Company having obtained from said circuit court an order allowing an appeal to the United States Supreme Court to reverse said decrees, and a citation, directed to the said Charles W. Ryan and J. William Ryan, the Arbuckle and Ryan Company, Marcus V. Barbour and Rowland Starr,

the Bodefield Belting Company, Walker P. Hall, E. J. Dodge, the Atlantic Trust Company, Frank Holt, treasurer of Ottawa county, Ohio, and Leander S. Baumgardner, is about to be issued, citing and admonishing them to be and appear at the United States Supreme Court, at Washington.:

Now, therefore, the condition of the above obligation is such that if the said The Put-in-Bay Water Works, Light and Railway
239 Company shall prosecute its said appeal to effect, and shall answer all costs that may be awarded against it if it shall fail to make its plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

THE PUT-IN-BAY WATER WORKS, LIGHT & RAILWAY CO., [SEAL.]
By WALTER L. GRANGER, *Attorney.*
THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By JAMES M. SPRAGUE, *Vice-President.*
Attest: JOHN C. SPRAGUE, *Assistant Secretary.*

Int. rev. stamp, 5 cents.

The sufficiency of the surety on the foregoing bond as well as the bond itself are approved this 1st day of June, 1900.

H. F. SEVERENS,
Circuit Judge.

(Endorsement:) No. 1087. U. S. circuit court, northern district of O., western division. The Electrical Supply Co. *vs.* The Put-in-Bay Water Works, Light & Railway Co. *et al.* Bond on appeal. Filed Jun- 2, 1900. Irvin Belford, clerk.

[Endorsed] Copy of appeal bond.

240 United States Circuit Court, Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY, Complainant,
vs.
THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY *et al.*, Respondents. } No. 1087.

Citation on Appeal.

UNITED STATES OF AMERICA, *Northern District of Ohio,* } ss:

The President of the United States to Charles W. Ryan, J. William Ryan, surviving partners of the late partnership firm of Arbuckle, Ryan and Company; the Arbuckle Ryan Company, a corporation; Marcus V. Barbour, Rowland Starr, partners as Barbour and Starr; the Bodefield Belting Company, a corporation; Walker P. Hall, E. J. Dodge, whose first name is unknown; the Atlantic Trust Company, a corporation; Frank Holt, treasurer of Ottawa county, Ohio, and Leander S. Baumgardner, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date of the signing hereof, pursuant to the appeal filed in the office of the clerk of the United States circuit court for the northern district of Ohio, western division, in the above-entitled proceeding, wherein the said The Put-in-Bay Water Works, Light and Railway Company is appellant and you and each of you are appellees, to show cause, if any there be, why the final
241 decrees rendered against the said appellant, as respondent, at the December term, 1899, of said circuit court, and the other orders and decrees of the said circuit court mentioned in the petition on appeal should not be corrected and reversed and speedy justice should not be done to the said The Put-in-Bay Water Works, Light and Railway Company in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 31st day of May, 1900.

H. F. SEVERENS,
Circuit Judge.

242 *Marshal's Return to Citation.*

THE UNITED STATES OF AMERICA, *Northern District of Ohio,* } ss:

U. S. marshal's return.

I, M. A. Smalley, United States marshal for the northern district of Ohio, do hereby certify that I received the annexed citation on the 2nd day of June, 1900, and served the same as follows:

On the 7th day of June, 1900, I served the same on Charles W. Ryan and J. William Ryan, surviving partners of the former part-

nership of Arbuckle, Ryan and Company, by delivering to each of them personally a true copy of said citation at the city of Toledo, county of Lucas, in the said northern district of Ohio. On the same day I served the Arbuckle & Ryan Company, a corporation, by delivering to Charles W. Ryan, president of said company, a true copy of said citation personally at the city of Toledo, county of Lucas, in the said northern district of Ohio. On the same day I served the same on the Bodefield Belting Company, a corporation, by delivering to Charles G. Wilson, counsel of record of said party, personally a true copy of the said citation at the city of Toledo, county of Lucas, in the said northern district of Ohio. On the same day I served the same on Walker P. Hall, by delivering to George B. Boone, counsel of record of said party, personally a true copy of said citation at the city of Toledo, county of Lucas, in the said northern district of Ohio. On the same day I served the same on the Atlantic Trust Company, a corporation, by delivering to Julian Tyler, one of the counsel of record of said party, personally a true copy of said citation at the city of Toledo, county of Lucas, in the said northern district of Ohio. On the 8th day of June, 1900, I served the same on Leander S. Bumgardner, by delivering to him personally a true copy of said citation at the city of Toledo, county of Lucas, in the said northern district of Ohio. On the 10th day of June, 1900, I served the same
243 on E. P. Dodge, by delivering to him personally a true copy of the said citation at Put-in-Bay, county of Ottawa, in the said northern district of Ohio. On the 11th day of June, 1900, I served the same on Frank Holt, treasurer of Ottawa county, by delivering to Charles G. Wilson, counsel of record of said party, personally a true copy of the said citation at the city of Toledo, county of Lucas, in the said northern district of Ohio. On the same day I served the same on Marcus V. Barbour and Rowland Starr, partners as Barbour and Starr, by delivering to E. D. Potter, Jr., counsel of record of said parties, personally a true copy of the said citation at the city of Toledo, county of Lucas, in the said northern district of Ohio.

Dated at Toledo, in the northern district of Ohio, this 11th day of June, 1900.

M. A. SMALLEY,
U. S. Marshal,
By JOHN A. O'DUYER, *Deputy.*

Fees.

Service	22.00
Travel	3.30
Total	$25.30

244 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE ELECTRICAL SUPPLY COMPANY ET AL.
v.
THE PUT-IN-BAY WATER WORKS, LIGHT and Railway Company *et al.*
No. 1087. In Equity.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a true copy of so much of the original pleadings, records, papers, exhibits, and other proceedings in the above case as I am advised by counsel for the Put-in-Bay Water Works, Light and Railway Company are necessary to the hearing of the jurisdictional question in the United States Supreme Court. I further certify that there is attached to and transmitted therewith the original citation issued therein.

Seal of the Circuit Court, Northern Dist. of Ohio.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Toledo, in said district, on the 23rd day of June, A. D. 1900, and the 124th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk,*
By J. W. WILSON,
Deputy Clerk.

Endorsed on cover: File No., 17,817. N. Ohio C. C. U. S. Term No., 332. The Put-in-Bay Water Works, Light & Railway Company, appellant, *vs.* Charles W. Ryan & J. William Ryan, surviving partners of the late partnership firm of Arbuckle, Ryan & Co., *et al.* Filed June 28, 1900.

Office Supreme Court
FILED
NOV 21 1900
JAMES H. McKENNEY,
Clerk.

No. 332.

Brief for Appellant

Filed Nov. 21, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 332.

THE TOT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, APPELLANT,

vs.

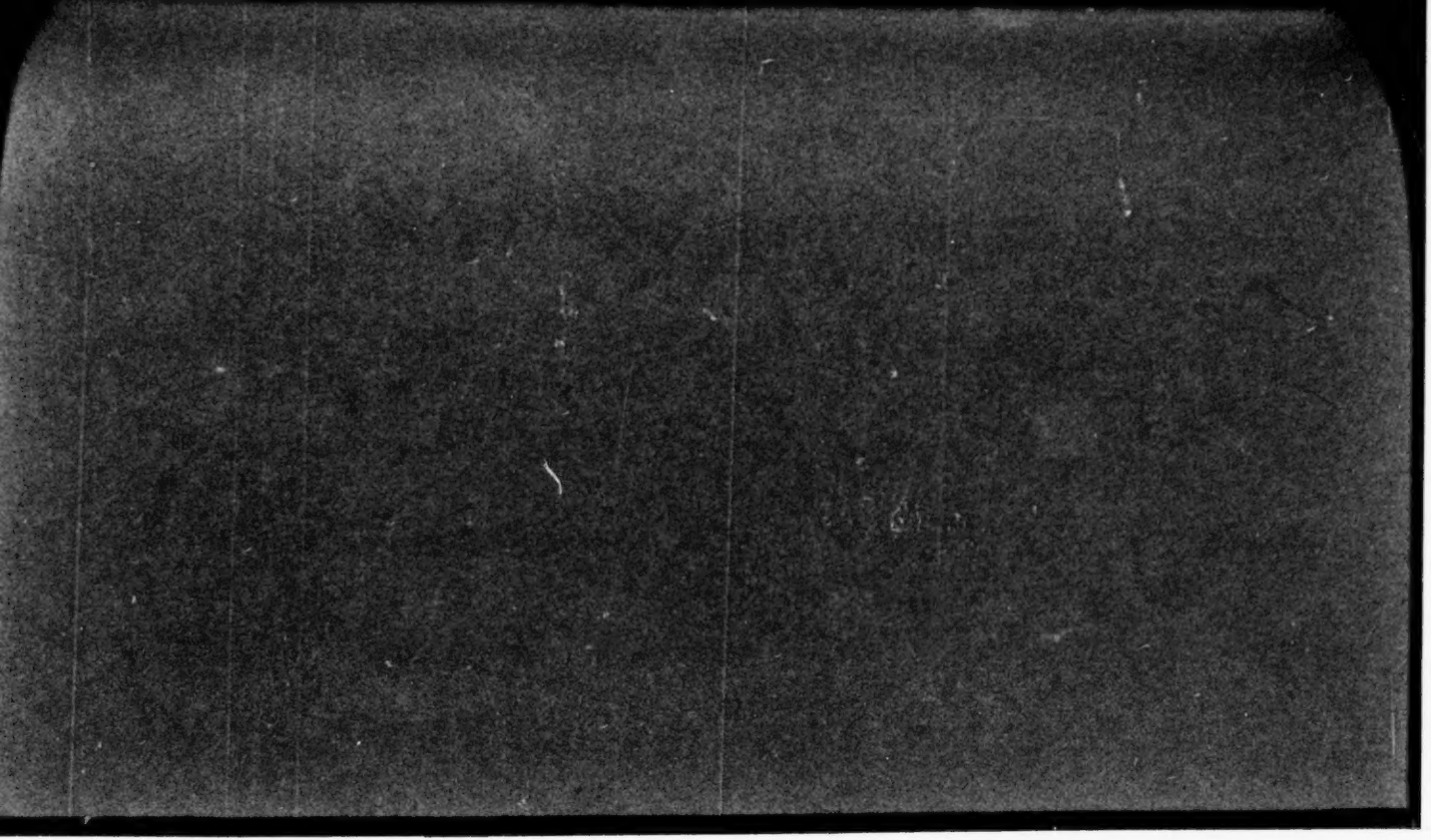
CHARLES W. RYAN AND J. WILLIAM RYAN, SURVIVING PARTNERS OF THE LATE PARTNERSHIP OF ARBUCKLE, RYAN & CO., ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANT.

JOSEPH T. FORAKER,
WALTER J. GRANGER,
Counsel for Appellant.

W. H. Anderson & Co., Law Publishers, Cleveland, Ohio.



SUPREME COURT OF THE UNITED STATES.

THE PUT-IN-BAY WATER WORKS, LIGHT and RAILWAY COMPANY, *Appellant*,

vs.

CHARLES W. RYAN and J. WILLIAM RYAN, surviving partners of the late partnership of ARBUCKLE, RYAN & COMPANY, ET AL., *Appellees*.

On Appeal.

No. 332.

Brief for Appellant.

STATEMENT OF THE CASE.

This proceeding is an appeal from the final decrees of the United States Circuit Court for the Northern District of Ohio, in a cause originally instituted by The Electrical Supply Company against The Put-in-Bay Water Works, Light and Railway Company and others, to enforce a claim and lien for materials and supplies furnished in the construction of the appellant's electric plant and railway, lo-

cated on Put-in-Bay or South Bass Island, Ottawa County, Ohio, and for the marshalling of liens. The appellant, a corporation created under the laws of Ohio, complains of said final decrees, as well as various previous orders, interlocutory in their nature and made at different times throughout the progress of the suit (all as specified in the Assignment of Errors filed herein), and appeals from the same, for the sole reason, as the Judge has certified in allowing the appeal, that the said Circuit Court was without jurisdiction and should have dismissed said cause.

In the language of the Judge's certificate, the appellant having denied the jurisdiction of the Court over said cause on the grounds that the amount in controversy was in truth much less than the sum of $2,000, exclusive of interest and costs, and that the cause had been fraudulently and collusively instituted by the parties thereto for the purpose of creating the appearance of jurisdiction not in fact existing, the contention was overruled so far as related to the Receiver's certificates and the intervening petitions. (See Printed Transcript, page 141).

After retaining the cause for a period of seven years, against the repeated objections of the appellant, final decrees were made in December, 1899, sustaining and enforcing the claims and liens of Arbuckle, Ryan and Company, so styled, for $15,033.44, Barbour and Starr, so styled, for $784.85, The Bodefield Belting Company for $486.88, and of Walker P. Hall and E. J. Dodge, as holders of receiver's certificates, for more than $10,000, to satisfy which the property of the appellant was ordered to be sold, and was sold for $16,501.00 to J. W. and C. W. Ryan, so styled, who are among the appellees herein; and said fund has been distributed since this appeal was taken.

We assume that appellant will not be restricted to the exact phraseology of the Court's certificate of the jurisdictional question involved, if the record itself may be found to amplify it, and, therefore, we take the privilege at this introductory point of adding that the want of jurisdiction referred not only to the true amount of the complainant's claim and the fact of collusion, but also to the fact that the inhibition contained in Section 720 of the Revised Statutes of the United States was plainly disregarded. Moreover, the jurisdiction complained of was asserted and enforced not only for the protection of the receiver's certificates and intervening claimants, but also to compel the payment by the appellant of every dollar of the many dollars of costs which had accrued throughout the entire progress of the litigation.

The best statement of the case, as revealing the question involved and the manner in which it was raised, as the 21st Rule of this Court requires, would seem to be an abstract of the proceedings as the record exhibits them in the pages of the Printed Transcript, said pages being indicated by the figures in brackets in the abstract which follows below.

On the 9th day of September, 1892, The Electrical Supply Company, a Connecticut corporation, filed in said United States Circuit Court its bill of complaint against The Put-in-Bay Water Works, Light and Railway Company, The Railway Equipment Company, an Illinois corporation, Arbuckle, Ryan and Company, a partnership in Ohio, James K. Tillotson, a citizen of Ohio, The Cleveland Electrical Manufacturing Company, an Ohio corporation, The Industrial and Mining Guaranty Company, a New York corporation, John P. Carrothers, a citizen of New York, and H. H. Warner, a citizen of New

York, alleging that it had a valid claim against The Put-in-Bay Water Works, Light and Railway Company amounting to $2,787.04, for certain material sold, furnished and used in the construction of said Company's electric railway, and also, by virtue of certain proceedings taken under the statutes of Ohio, had a good and valid lien upon the property constituting said electric railway. The bill alleged that the said James K. Tillotson and the other co-defendants claimed to have some interest in said property, and, asking that they might be required to appear and set up their interests, the bill also prayed that an account might be taken of the complainant's claim for material and a lien therefor be declared, and the property sold for the satisfaction of the same (1-3). The bill was signed and verified by one L. G. Richardson as Solicitor for the Complainant.

On September 10, 1892 (the day following the filing of the bill), the defendant, Tillotson, a citizen of Ohio, appeared and filed an answer and cross-bill (5-11) setting forth a history of the creation, organization and capitalization of The Put-in-Bay Water Works, Light and Railway Company, and alleging that he was the Vice President of the Company and the owner of 1,545 shares of its 1,500 shares of authorized capital stock, and that he was also the owner of 125 bonds, of $1,000 each, which had been issued by the Company and were secured by first mortgage on its railway property, in which mortgage The Atlantic Trust Company, a New York corporation, was the mortgagee in trust for the holders of said bonds; that said stock and bonds had been given and delivered to him, the said Tillotson, by the Company to pay him for the work done and the material and property used in the construction of the railway and its appurtenant plant, under a contract between him and the

said Company, the terms of which contract were set forth in detail in the bill. The said Tillotson further alleged in his said answer and cross-petition that he had, in June, 1892, in an effort to negotiate the sale of the said bonds, entered into a contract in New York City with the co-defendants, The Industrial and Mining Guaranty Company (a New York corporation), John P. Carrothers and H. H. Warner (citizens of New York), whereby the said co-defendants agreed to negotiate the sale of said bonds on certain terms and conditions, alleged in detail, and in furtherance of which said contract, he, the said Tillotson, had placed the 125 bonds and 1,000 shares of the stock in the possession of the said co-defendants; that said co-defendants had failed to comply with their contract and were, therefore, not entitled to retain possession of said bonds and stock, and were wrongfully threatening to sell and dispose of the same, and were insolvent; and by his said answer and cross-petition the said Tillotson prayed that a restraining order should issue against the said John P. Carrothers, H .H. Warner and The Industrial and Mining Guaranty Company forbidding them, during the pendency of the suit, from negotiating, selling, or otherwise disposing of any of said bonds or stock, and also restraining them from transferring any of said stock upon the books of the Railway Company, and that a writ of subpoena might issue commanding said defendants to appear and show cause why said bonds and stock should not at once be returned to the defendant, Tillotson, and that on the final hearing of the case said restraining order be made perpetual; also praying the court to appoint a receiver to take charge and custody of the railway property in plaintiff's bill of complaint described.

Immediately upon the filing of said answer and cross-petition, and without notice to or the presence of any of the other parties to the bill than the said Tillotson, a temporary restraining order was issued and a receiver, L. S. Baumgartner, was appointed as prayed for (11, 15).

On September 26, 1892, The Put-in-Bay Water Works, Light and Railway Company filed its answer (16-17), admitting that it had purchased material from the complainant to be used in the construction of its railway, but denying that the articles mentioned in Exhibit "A," attached to complainant's bill, was a true and correct statement of the material furnished by complainant and used by said Railway Company in the construction of its said railway; and alleging, on the contrary, that a large part of said material was sold and delivered by the complainant to the said James K. Tillotson for the purpose of being used, and they were used, in the construction of certain property known as the Hotel Victory on South Bass Island; that the material sold by complainant to the Railway Company was not of the value of $2,787.04, as set forth in the bill, but amounted in value to only about the sum of $700, and no more; that complainant well knew that a large part of said material was sold and delivered to the said Tillotson for the the purpose of being used in the construction of a hotel and had no connection whatever with the said railway; that the complainant had procured a lien to be filed with the Recorder of Ottawa County, Ohio, against the railway property, on the day previous to the filing of the bill, for the entire amount of the material sold to Tillotson and the material sold to the defendant Railway Company, and had procured said lien for that amount *at the request of*

said Tillotson, for the express purpose of enabling the complainant to institute this action in the Federal Court.

On September 26, 1892, the co-defendant, John P. Carrothers, filed his answer to the answer and cross-bill of Tillotson (18, 19), taking issue with Tillotson's allegation that the said Carrothers, Warner and The Industrial and Mining Guaranty Company had failed to perform their contract concerning the negotiation and sale of said bonds, and alleging that on the 25th day of July, 1892, at a meeting of the stockholders of said Put-in-Bay Water Works, Light and Railway Company, he, the said Carrothers, had been elected president of the said Railway Company by the unanimous vote of all the stockholders; that as such president he had requested the said Tillotson to deliver to him the possession of said railroad, and also all the papers, contracts and personal property belonging thereto; that said Tillotson had declined to comply with said request, but continued to retain forcible possession of said property, until the 3d day of September, 1892, when the said Railway Company obtained possession and control of said railway by virtue of a writ of replevin, and that he, the said Carrothers, as president of said Railway Company, had possession of said railway property under said writ of replevin from said 3d day of September, 1892, until the appointment of a receiver in this action.

On September 26, 1892, The Put-in-Bay Water Works, Light and Railway Company filed its answer to the answer and cross-petition of the said Tillotson (21-25), the material allegations of which, so far as this appeal is concerned, being, that on or about the 3d day of September, 1892, the said defendant, Tillotson, attempting to interfere with the said Company in the operation of its railway, and to

prevent the said Railway Company from having the peaceable enjoyment of said property, the Common Pleas Court of Ottawa County, Ohio, on the petition of said Put-in-Bay Water Works, Light and Railway Company, issued a restraining order enjoining the said Tillotson from interfering or attempting to interfere in any manner with the said Company in the operation of its railway, and which said restraining order was in full force and effect.

On September 30, 1892, Arbuckle, Ryan and Company, so-called, filed their answer and cross-petition, setting up a claim of $11,153.60 for work and material performed and furnished by them for the said Railway Company in the construction of its said railway, and their compliance with the statutes of Ohio, whereby they had acquired a lien upon said property for the payment of said claim, and asking that the amount due and owing to them might be ascertained and a lien therefor be declared and that the same might be satisfied out of the proceeds of the sale of the property.

With the record in the condition as thus far shown, the receiver, on October 15, 1892, filed his motion (28) asking for leave to issue certificates of indebtedness for the purpose of raising money to enable him to meet the needs and necessities of the property in his hands, to the extent of $5,000.00, and upon the same day, without notice to The Put-in-Bay Water Works, Light and Railway Company, said order was granted. Under this order the receiver issued his certificates in the sum of $5,000.00, but at what date they were negotiated has not been made to appear.

On October 29, 1892, The Industrial and Mining Guaranty Company filed its motion for a dissolution of the injunction, and on the same day The Put-in-Bay Water Works,

Light and Railway Company filed a motion for the discharge of the receiver (31, 32). In support of these motions certain affidavits were filed, namely, the affidavit of John P. Carrothers (32-38) and the affidavit of Franklin S. Terry (40, 41). The affidavit of Carrothers reiterated the fact that on the 3d of September, 1892, the property in question had been replevined from the said Tillotson, and that the company was in possession under the said replevin, and that Tillotson, still persisting in his interference with the operation of the road, was, on the 3d day of September, 1892, enjoined by an injunction issued by the Common Pleas Court of Ottawa County, Ohio, from further interfering with the company's operation of said railway. The affidavit of Franklin S. Terry set forth the facts that he was the manager and attorney in fact of the complainant, The Electrical Supply Company, and that on September 6, 1892, his company was approached by one L. G. Richardson, representing himself to be an attorney practising at Toledo, Ohio, and as being familiar with the affairs of The Put-in-Bay Water Works, Light and Railway Company; that Richardson advised affiant to file a lien for The Electrical Supply Company against The Put-in-Bay Water Works, Light and Railway Company for the amount of its claim and to authorize him to commence suit against the Railway Company in the Federal Court, asking for a foreclosure of said lien and for an accounting; *and that the object of said suit was for the purpose of enabling the defendant, Tillotson, to file therein his cross-petition for the purpose of having a receiver appointed;* that on September 15, 1892, affiant received a letter from Richardson, stating that he had filed a lien against the said Railway Company and had brought suit in the name of The Electrical

Supply Company, asking for a foreclosure and an accounting; that the complainant corporation was induced and led into said proceedings innocently and ignorant of the facts which had been suppressed by Tillotson and Richardson; that complainant corporation was induced to include all sums due for material furnished for the Hotel Victory Company in the account against the Railway Company; that the material actually used in the construction of the railway amounted to $861.23, and that the balance, $1,925.81, was for material used in the construction of the Hotel Victory; that the said Richardson prepared the lien and the bill filed in this action and advised affiant that said lien and the allegations in said bill were proper ones for the complainant to verify.

No replication was ever filed by complainant or Tillotson to the answers of Carrothers and The Put-in-Bay Water Works, Light and Railway Company, nor was any evidence offered to refute the allegations in those answers and in the affidavits of Carrothers and Terry relating to the collusive bringing of this suit, the lack of jurisdictional amount, the fact that the railway property was in possession of the Company under the replevin from Tillotson, and the fact that Tillotson was resting under an injunction of the Common Pleas Court of Ottawa County, Ohio, barring him from the possession and operation of the railway property; but pending the hearing of the motion to dissolve the restraining order issued in this cause and the motion to discharge the receiver, there was filed a motion by the receiver on December 21, 1892 (43, 44) for an order authorizing him to issue and dispose of additional certificates of indebtedness to the extent of $5,000, to enable him to

meet the needs and necessities of the property in his hands and to pay labor claims.

On the following day, December 22, 1892, the Court heard the motions to dissolve the restraining order and to discharge the receiver, and also heard the motion of the receiver for authority to issue forther certificates of indebtedness, and on the same date entered its orders (1) overruling the motion to dissolve the restraining order, and (2) refusing to discharge the receiver, and (3) granting the receiver authority to issue additional certificates in the sum of $5,000 (44, 45).

On January 20, 1893, an appeal was prayed by The Industrial and Mining Guaranty Company, and was allowed, from the order refusing to dissolve the injunction and continuing it in force, one of the grounds being that the Court erred in retaining jurisdiction of the cause (46). The appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, and pending the hearing on appeal, Marcus B. Barbour and Roland Starr, citizens of Ohio and partners doing business as Barbour & Starr, and The Bodefield Belting Company, an Ohio corporation, were permitted to intervene and to set up claims and liens against the Railway Company and its property, for supplies sold and furnished, the former for the sum of $538.74, and the latter for the sum of $338.11 (49, 50).

On September 20, 1893, there was filed with the clerk in this cause the opinion of the Circuit Court of Appeals on the appeal from the order continuing the injunction, and on October 21, 1893, the mandate of that court referring to said opinion was filed. The judgment of the Circuit Court of Appeals reversed the decree of the lower Court and commanded the dissolution of the injunction, for the

reason that the evidence showed that the Court had no jurisdiction of the cause because of the lack of sufficient amount in complainant's real claim, the collusion by which the jurisdiction had been sought, and also because of the the unlawful interference through this proceeding with the proceedings in replevin and for an injunction in the State court.

The mandate is set forth on pages 52 and 54 of the Transcript of the Record herein, and the opinion of the Circuit Court of Appeals is printed in full on pages 54-68 of the Transcript, and will be referred to more particularly in the argument to follow. It is reported in 58 Fed. Rep., 732.

No voluntary action was taken at once by the Circuit Court under the mandate, but on December 5, 1893, The Put-in-Bay Water Works, Light and Railway Company, The Industrial and Mining Guaranty Company and Corrothers filed their joint motion for an order dismissing the cause *for want of jurisdiction* (69). The Court, thereafter, by an order entered on December 14, 1893 (69, 70), purporting in terms to be in obedience to said mandate, and not referring to the motion to dismiss the cause for want of jurisdiction, dissolved the injunction at the cost of Tillotson, and there paused.

On December 28, 1893, the motion to dismiss for want of jurisdiction came on to be heard, and a decree was entered (70, 71), appointing Irvin Belford, the Clerk of the Court, a special master commissioner for the purpose of examining the accounts of the receiver with (sic) special reference to the disposition made by him of the proceeds of the certificates heretofore issued, and containing this further direction: "It is further ordered that the master designated herein shall cause the defendants, The Put-in-

Bay Water Works, Light and Railway Company, The Industrial and Mining Guaranty Company, and John P. Corrothers, to file with him a true and correct statement of all their expenses arising from this action, and the said master shall, within the time herein fixed for his report, take testimony for the purpose of establishing the actual amount of damage sustained by said defendants, in addition to the expenses of the aforesaid defendants and the expenses found by said master to have accrued to said defendants, or any of them, and such reasonable and fair damages as they may have sustained by reason of the said cross-petitioner's action herein."

Nothing further was done by the Court, until, the special master's report having been filed (70-73), finding that the receiver had received cash funds to the amount of $12,-230.90 from all sources ($8,776.10 being proceeds from certificates), and had expended in construction, repairs, operating expenses, insurance, labor claims, and the redemption of one certificate, the aggregate sum of $11,969.58, and finding the receiver entitled to a compensation of $2,-200 for himself and attorneys, and that The Industrial and Mining Guaranty Company had incurred an expense of $8,-795.23 for attorney's fees and expenses in and by its defense to the Tillotson cross-bill and the injunction, a decree was entered on June 12, 1894 (74), granting the motion to dismiss for want of jurisdiction *on the condition* that somebody (not named, but inferentially The Put-in-Bay Water Works, Light and Railway Company) should first pay into court the amount due on the certificates issued by L. S. Baumgartner, receiver, and the payment to the clerk of the costs in this case, including the compensation of the receiver, taxed at $2,200.

On December 5, 1894, Arbuckle, Ryan & Co. filed a motion (75) alleging that the outstanding receiver's certificates were held by Walker P. Hall and James E. Hutton, and had, in fact, been fully paid and should be ordered cancelled, and requesting a finding of that fact and a dismissal of the cause in accordance with the conditional order of dismissal made and entered on June 12, 1894. This motion was not disposed of until March 4, 1895, when an entry was made (76) finding that the said certificates had not been paid, and that they were still a first lien upon all the property and franchises of The Put-in-Bay Water Works, Light and Railway Company, and decreeing that the cause should not be dismissed "until said receiver's certificates and the expenses and costs of this cause are paid in full," and overruling the motion of Arbuckle, Ryan & Co. to dismiss the cause.

On October 9, 1895, The Put-in-Bay Water Works, Light and Railway Company filed another motion for an order of dismissal (77, 78), alleging as reasons the opinion of the Circuit Court of Appeals and its mandate that such execution and further proceedings be had in the cause as according to right and justice and the laws of the United States ought to be had, the lack of jurisdictional amount in the original bill, and the collusive and fraudulent manner in which the suit had been brought, as the Circuit Court of Appeals had found. This motion was heard, after notice to all parties concerned, on May 14, 1896, with the result only that on June 3, 1896, an opinion was handed down (81, 82) in the words, *inter alia*, that the motion of The Put-in-Bay Water Works, Light and Railway Company, directing the receiver to surrender the property in his hands and dismissing the suit, should be denied, the judge saying: "My opinion being that there are certain charges incurred

in the receivership, the extent of which is not determined, which must be ascertained and satisfied before the property can be released and the case dismissed. This order, however, to be without prejudice to the renewal of a like application and motion when the situation of the case shall be ripe for dismissal."

On June 26, 1896, The Put-in-Bay Water Works, Light and Railway Company, acting upon the suggestion of the Court that an application for the dismissal of the cause might be renewed when the situation should be ripe for a dismissal, filed its petition (82-84), calling the Court's attention to its previous order directing the receiver to lease the railway property for the season, under which order the property had been leased until October 1, 1896, and tendering a good and sufficient bond for the payment of all charges incurred in the receivership that might be determined to be a first lien upon the petitioner's property, and praying for an order directing the receiver to forthwith deliver the said property to the petitioner upon the filing of said bond and to recall the lease and restore to the lessees the money paid by them for the lease, and asking for a further reference to ascertain the amount of the charges incurred by the receiver and to state an account of the proceeds of the receiver's certificates, and to whom and for what the same had been paid.

On July 15, 1896, this petition was passed upon by the Court, and an order was entered (85, 86) granting the petition so far as it prayed for a restoration of the property upon the giving of the bond tendered, but continuing it for further hearing as to the cancellation of the lease. We quote here the decretal part of the order: "It is therefore ordered, adjudged and decreed by the Court that upon the said respondent, The Put-in-Bay Water Works, Light

and Railway Company, giving its certain bond to the Clerk of this Court, for the use and benefit of the parties who may hereafter be found entitled thereto, in the sum of $20,000, and with sureties to be approved by the Clerk of this Court, and having therein the following conditions, to-wit, that the obligors of said bond bind themselves to secure the payment of all charges incurred in the receivership of this action, including the certificates aforesaid, which may finally be determined to be a lien upon the property of said respondent, The Put-in-Bay Water Work, Light and Railway Company, and shall, in giving this bond, *submit themselves to the jurisdiction of this Court* to the end that this Court may make such bond effectual for the collection of said charges by order or decree in this cause, that may be finally determined as aforesaid, said receiver turn over to said defendant company all the property of said defendant now in his hands as such receiver, including its railroad. It *is further ordered that this decree shall in no way interfere with the possession of said lessees under the lease heretofore made under the sale of June 23, 1896.* And it further appearing to the Court that The Arbuckle-Ryan Company claim to have made certain improvements and repairs upon the property of said respondent Railway Company in putting said property in condition for operation for the season of 1896, it is ordered that Charles S. Bentley be, and he is hereby, appointed a special master commissioner with directions to proceed forthwith to take testimony as to the expenditures claimed to have been made by said Arbuckle-Ryan Company in and about the preparation of the railroad of said petitioner for operation during the season of 1896, together with the dates of the items of the said expenditures, respectively, and upon the question whether same were incurred in good faith, and that the petitioner, The Put-in-Bay Water Works, Light and Railway Company, and all other interested parties shall be permitted to produce witnesses before said special master relative to such expendi-

tures, and shall be permitted to cross-examine the witnesses produced by the said The Arbuckle-Ryan Company in accordance with the usual manner of taking testimony; that the said petitioner shall be permitted to present to said special master and adduce testimony concerning any claims for damages accrued to it by reason of any action of the said Arbuckle-Ryan Co. or its agents, while claiming to occupy, repair or use said property as lessee under the former order of this Court, and that said master is hereby instructed to report to this Court without delay his findings of fact and conclusions of law as to the validity of such claims made by The Arbuckle-Ryan Company, including the good faith with which they were created, and of the said petitioner, The Put-in-Bay Water Works, Light and Railway Company, as to whether the claims of the said Arbuckle-Ryan Company should be allowed. And it is further ordered that upon the turning over by the receiver of the property now in his hands to the respondent Company, he make further report of his doings and accounts since the date of his last report upon those general subjects."

The Put-in-Bay Water Works, Light and Railway Company refused to comply with this order, and, therefore, on April 17, 1897, an order was entered (87) setting aside the decree of July 15, 1896, for a conditional restoration of the property to said Company.

On the same day, April 17, 1897, The Put-in-Bay Water Works, Light and Railway Company filed its motion (87, 88) asking for a reference to a master to ascertain and enable the Court to determine against whom the expenses of the receivership, including the certificates of indebtedness issued by the receiver, should be charged, having regard to what portion of said expenditures and the costs of this suit had resulted in permanent benefit to the said Company's property; which motion was granted (88, 89) to the ex-

tent of appointing a special master to ascertain and report the following, to wit: To what extent the expenditures and liabilities of the receiver had been incurred, (1) in permanent improvement of the Company's track or property and additions to its plant; (2) in the care and preservation of the Company's property; (3) in discharge of any lien upon the property; (4) in the payment of indebtedness for labor expended upon the property which had been incurred prior to the appointment of the receiver; (5) in other and what expenditures of the trust; (6) in matters, if any, outside of the authority given by the orders of the Court authorizing the issue and sale of the receiver's certificates; also to hear testimony and report to the Court (1) what compensation the receiver is entitled to in caring for and preserving the property, and his management as receiver; (2) what counsel fees should be allowed for legal services rendered to the receiver in the management of his trust; (3) what costs has been incurred by The Put-in-Bay Water Works, Light and Railway Company in the progress of this cause, intending hereby those which are taxable; (4) to what extent the expenditures and liabilities incurred by the receiver have resulted in permanent benefit to the property of The Put-in-Bay Water Works, Light and Railway Company.

On December 29, 1897, one Frank Holt, as Treasurer of Ottawa County, Ohio, was allowed to enter his appearance and file an intervening petition setting up a claim for delinquent taxes existing against the property of The Put-in-Bay Water Works, Light and Railway Company (89, 90).

On December 30, 1897, Arbuckle, Ryan & Co. moved the Court for an order allowing them to introduce testimony upon the question of jurisdiction "heretofore deter-

mined by the Circuit Court of Appeals in this cause," which motion was on the same day denied on the ground of laches and also "because this Court is of the opinion that the matter is foreclosed by the decision of the Circuit Court of Appeals" (91).

On the same date, December 30, 1897, the Court entered an order (91, 92) confirming the reports of Master Belford and Master Harris, awarding them and their stenographers certain compensations to be paid by the receiver out of the funds in his hands; also awarding further compensation to the receiver and his attorneys; also finding that Walker P. Hall and E. J. Dodge were the owners of the outstanding receiver's certificates and were entitled to the payment thereof out of the funds in the hands of the Court, or out of any funds that might hereafter come into the hands of the Court, or be created for that purpose, but denying the motion of Hall for a distribution at that time of said funds in payment of said certificates.

On January 31, 1898, the opinion of the Court was filed on the question of jurisdiction, *upholding the jurisdiction for the special purpose of protecting the receiver's debts and the claims of Arbuckle, Ryan & Co., and other intervenors.* This opinion is set forth in the Transcript of the Record herein, pages 93-96, and is also reported in 84 Fed. Rep., page 740.

On March 11, 1898, The Put-in-Bay Water Works, Light and Railway Company filed its motion (96-100), setting forth the findings of the master, under the order directed to him on April 17, 1897 (88, 89), and referring to the receiver's reports theretofore filed, and complaining that the Court had not as yet finally determined against whom the liabilities of the receivership and the costs in this cause

should be charged, and directing the Court's attention again to the facts that it was shown by the record that this cause had been collusively and fraudulently instituted and was in violation of Section 720 of the Revised Statutes of the United States, in that it avoided and was intended to avoid the effect of the action in replevin and the suit in equity theretofore, and at the time of the filing of the bill herein, and still pending in the Common Pleas Court of Ottawa County, Ohio, and praying that an order be entered charging the amounts of the liabilities of the receivership and the costs of this suit as justice and equity required, and to dismiss the suit.

This motion was overruled, *without any qualification*, by an order entered April 7, 1898 (100).

On April 2, 1898, The Atlantic Trust Company, a corporation created and existing under the laws of New York, and being the mortgagee trustee to whom the mortgage securing the bonds heretofore mentioned had been executed by The Put-in-Bay Water Works, Light and Railway Company, filed by leave of Court, its intervening petition by Parks and Van Campen, solicitors. It was verified by Lysander K. Parks, one of the solicitors (100-107). This intervening petition set up the fact of the execution of the mortgage and bonds, default in the payment of interest, and asserted a lien upon the property and prayed for a sale thereof and other equitable relief.

On November 25, 1898, one Simon Baruch, a citizen and resident of New York, as *amicus curiae*, filed his statement in Court (107, 108) alleging that he was a holder of and interested in some of said bonds, and objecting to the entry and appearance in this cause of The Atlantic Trust Company, alleging that the appearance by the counsel, Parks and Van Campen, was without any right or authority on

behalf of or from said Atlantic Trust Company, and that for said Company to be brought into the cause was contrary to the interest of the bond-holders, and was done by counsel, assuming to represent the said Trust Company, *but in the interest of Arbuckle, Ryan & Co.*, and showing that the claim of Arbuckle, Ryan & Co. was contrary to the interest of the holders of said bonds.

On November 21, 1898, The Put-in-Bay Water Works, Light and Railway Company demurred to the answer and cross-petition of Arbuckle, Ryan & Co., one of the grounds of the demurrer being that said Court was without jurisdiction to hear or determine any of the issues raised in said answer and cross-petition; and on the same date the said Company filed a similar demurrer, alleging a similar reason, to the intervening petition of Barbour & Starr; and on the same date filed a similar demurrer, for a similar reason, to the intervening petition of The Bodefield Belting Company, The Atlantic Trust Company and Frank Holt, Treasurer of Ottawa County. (For the foregoing demurrers see pages 108-114.)

On November 23, 1898, the Court, by its order entered on that date (114-117), overruled all of said demurrers, and made a finding of an indebtedness on the part of The Put-in-Bay Water Works, Light and Railway Company to Arbuckle, Ryan & Co. and Barbour & Starr, and overruled the suggestions of said Simon Baruch as to the filing of an interevening petition by The Atlantic Trust Company.

On April 4, 1899, Arbuckle, Ryan & Co., by leave of Court filed an amended answer and cross-bill, re-asserting their claim against The Put-in-Bay Water Works, Light and Railway Company and their lien, under the Ohio statute, upon its property, and asking for a sale of the prop-

erty and the payment of said lien out of the proceeds of sale (117-119).

On April 14, 1899, The Put-in-Bay Water Works, Light and Railway Company filed its motion protesting against the filing of the intervening petition of The Atlantic Trust Company for jurisdictional reasons therein stated (120, 121).

On June 19, 1899, Irvin Belford, as special master, filed his report (123-125) on the amended answer and cross-bill of Arbuckle, Ryan & Co. and the intervening petitions of Barbour & Starr and The Bodefield Belting Company, finding (1) that there was due to Arbuckle, Ryan & Co. the sum of $10,576.75, with interest from August 1, 1892; (2) to Marcus V. Barbour and Rowland Starr (Barbour & Starr), the sum of $538.74, with interest from June 21, 1892; (3) to The Bodefield Belting Company the sum of $338.11, with interest from September 6, 1892; also finding that each of these claimants had complied with the laws of Ohio for the procurement of liens for the material and work specified in their respective accounts and securing the claims so found due to them.

On December 12, 1899, a decree was entered (127, 128) ordering that the intervening petition of The Atlantic Trust Company be taken *pro confesso* as to all parties, on default for answers, and again referring the cause to Irvin Belford to ascertain the number and dates of sale of the bonds secured by the mortgage described in said intervening petition, the names of the owners and holders thereof, and the amounts due and unpaid thereon, both principal and interest.

On December 13, 1899, a final decree was entered (128, 129) confirming the report of Special Master Belford,

filed June 19, 1899, and, in addition to directing the payment of fees to the master and his stenographers, ordering, adjudging and decreeing that Arbuckle, Ryan & Co. had a valid and subsisting lien for the sum of $10,576.75 with interest from August 1, 1892, on the portions of the property of The Put-in-Bay Water Works, Light and Railway Company, known as the power-house and the lands on which it is located, as well as upon the buildings, fixtures, plant, machinery and appurtenances thereto and thereon; that Marcus B. Barbour and Rowland Starr (Barbour & Starr) had a lien on the same property for the sum of $538.74, with interest from June 21, 1892; and that The Bodefield Belting Company had a lien on the same property for the sum of $338.11, with interest from September 6, 1892; and fixing the priority of said liens.

On December 14, 1899, an order was entered (129, 130) granting the application of Walker P. Hall for an order directing the receiver to pay out of the funds in his hands such sums as might be proper in payment of receiver's certificates, and decreeing the payment of $1,853.94 to Walker P. Hall, and $122.07 to E. J. Dodge, which, with moneys received by Hall under a former order of court, "fully liquidates and pays all interest upon the several certificates heretofore issued and now outstanding, computed to the date of this order, December 13, 1899."

On December 15, 1899, a decree was entered (130-132) finding past due and unpaid on receiver's certificates the sum of $7,996.10, and that this amount and the costs of the case taxable against The Put-in-Bay Water Works, Light and Railway Company was the first and best lien on all the property of said Company, and, there being no income or moneys available in the hands of the receiver sufficient to

provide for the payment of said certificates and costs, ordering, adjudging and decreeing that unless said "defendant or party in interest pay or cause to be paid to the Clerk of this Court the amounts so as aforesaid found due for receiver's certificates and costs, together with the sum of $15,033.44 theretofore found due to Arbuckle, Ryan & Co., and the sum of $784.85 theretofore found due to Barbour & Starr, and the sum of $486.88 theretofore found due to The Bodefield Belting Company, within thirty (30) days from the date of the decree, all the property of The Put-in-Bay Water Works, Light and Railway Company, specifically described, and all the right, title and equity of redemption of said Company and each and every party to this action in and to the said property and in and to all property acquired by said Company since the date of the filing of the bill herein, or by the receiver appointed, should be offered for sale, etc., etc.

On March 10, 1900, the report of the marshal having been filed, showing the sale of said property under the foregoing decree for $16,501 to J. W. and C. W. Ryan, the sale was confirmed conditionally; and subsequently, on March 26, 1900, the sale was finally confirmed and a deed was ordered to be immediately executed to the purchasers (133, 134).

On June 8, 1900, an order was entered, distributing the fund (134-136).

Previous to the order of distribution, on June 2, 1900, The Put-in-Bay Water Works, Light and Railway Company presented its petition for appeal to the United States Supreme Court (137, 138) on the sole ground that the Circuit Court has no jurisdiction in this cause, and filed its Assignment of Errors (138-140) and its bond on appeal (142, 143), and the petition was allowed and a certificate of the

jurisdictional question was made by the Court (141); to all of which we respectfully refer.

ARGUMENT.

Our contention is that the Circuit Court erroneously failed and refused to dismiss the cause and to restore to appellant the possession of its property, in violation of Section 5 of the Act of Congress of March 3, 1875; and we now ask this Court to correct that error and order the restitution to the appellant which the lower court should have made.

Morris vs. Gilmer, 129 U. S. 315.

Railway Co. vs. Swan, 111 U. S. 379.

Blacklock vs. Small, 127 U. S. 96.

That the sum demanded in the original bill was false, and that the true sum was less than $2,000, exclusive of interest and costs, and that the suit had been improperly and collusively made between the complainant and the co-defendant, Tillotson, a citizen of Ohio, to enable the latter to bring into the Federal Court his controversy with the appellant, an Ohio corporation, concerning the matters and things set out in his cross bill, and that this was done to evade certain replevin and injunction proceedings then and still pending in the State court between the same parties and involving the same controversy, were facts which were never denied from the time they were brought to the attention of the Court by the pleadings, within two weeks after the original bill was filed and the receiver was appointed. The original bill was filed on September 9, 1892; the answer and cross bill of Tillotson was filed Septem-

ber 10, 1892; the answers of The Put-in-Bay Water Works, Light and Railway Company and the co-defendant Carrothers were filed September 26, 1892; and from this latter date, by the showing of these answers, to which no replication was filed, *there was not a moment when the Court was not apprised of the fact that its jurisdiction had been imposed upon.*

If the undisputed allegations of the pleadings were not sufficient to create such a legal certainty of the want of jurisdiction as to the warrant the Court *sua sponte* to proceed no further and to dismiss the suit, the evidence offered to that effect by the affidavit of Carrothers, filed October 29, 1892 (32-38), and the affidavit of F. S. Terry, representing the complainant, filed November 12, 1892 (40, 41), which were submitted to the Court, December 22, 1892 (44, 45), at the hearing of the motions to dissolve the restraining order and to discharge the receiver, were sufficient for that purpose in substance, *and were sufficient in form.* (Morris vs. Gilmer, 129 U. S. 315, 326). The conclusiveness of this evidence was established by the opinion of the Circuit Court of Appeals, which was filed in the Circuit Court as early as September 20, 1893 (54-69). *On the proposition that there was no jurisdiction the Judges of the Circuit Court of Appeals were in entire accord.*

The difficulty which the appellant encountered in urging its repeated motions for an order dismissing the suit for want of jurisdiction (the first one of which was filed December 5, 1893), originated apparently from the suggestion in the opinion of the Circuit Court of Appeals in the words found on page 67 of the printed Transcript, to wit: "With reference to the receiver's certificates, issued under the order of the Circuit Court, so far as the same have been

negotiated and their proceeds applied to the preservation and protection of the property pending this litigation, the discharge of the liens thereon and the indebtedness owing by The Put-in-Bay Company for labor which had accrued before this suit, all just and reasonable expenditures should be allowed to the receiver as made in the common interest of all concerned in the property. An order should be entered in the cause requiring the receiver to render a full and detailed account of his expenditures, the purpose for which, the persons to whom, and the dates when the same were made, and referring it to a master to examine and report upon said account."

Acting upon this allusion in the decision of the Circuit Court of Appeals to the receiver's indebtedness, Judge Ricks, who presided over the suit from its commencement until May, 1896, when Judge Severens was specially designated to act, made the first order upon appellant's motion to dismiss the cause, by appointing a master to examine the account of the receiver "with special reference to the disposition made by him of the proceeds of the certificates heretofore issued," and also by directing the master to ascertain and report the amount of the expenses and damages incurred by the appellant and The Industrial and Mining Guaranty Company and John P. Carrothers, arising out of this litigation (70, 71).

On the coming in of the report (70-73), a decree was entered on June 12, 1894 (74), granting the appellant's motion to dismiss *on the condition* that (inferentially) the *appellant* should first pay into court the amount due on the certificates (inferentially, $8,776.10), *and also the costs of the suit, including the compensation of the receiver and his attorneys, taxed at $2,200.*

On March 4, 1895, an order was entered (76) finding that the receiver's certificates had not been paid and decreeing that the suit should not be dismissed "until the receiver's certificates *and the expenses and costs of this cause are paid in full.*"

A somewhat modified order, but along the same line, was next made by Judge Severens (81-83) on June 3, 1896, thus expressed: "My opinion being that there are certain charges incurred in the receivership, the extent of which is not determined, which must be ascertained and satisfied before the property can be released and the case dismissed, even if the case be dismissed and the property surrendered; this order, however, to be without prejudice to the renewal of a like application and motion when the situation of the cause shall be ripe for a dismissal."

On June 26, 1896, the motion to dismiss was renewed by appellant (82-84) with an offer of a bond for the payment of such charges incurred by the receiver as might be determined to be a lien upon its property, and asking for a reference to ascertain the amount of such charges and for an account of the proceeds of the certificates, and as to whom and for what the same had been paid. Another feature of this motion was that it referred to a lease of the property for the summer season of 1896, which the Court had authorized the receiver to make, and which had been made, and the motion also asked that this lease be cancelled, and that the money the lessees had paid should be returned to them by the receiver, and the property surrendered to the appellant, freed from said lease. On July 15, 1896, the motion was passed upon, granting the motion so far as it prayed for the restoration of the property upon the giving of a bond, *but continuing it for further hearing as to the cancellation of the lease.* The amount of the bond required was $20,-

000, and the order of the Court was that the bond should contain *an obligation on the part of the appellant to pay all charges incurred in the receivership, including the certificates, which might finally be determined to be a lien upon the property, and that in giving said bond, the appellant should submit itself to the jurisdiction of the Circuit Court to the end that the Court might make such bond effectual for the collection of said charges by order or decree. The order also provided that the decree should in no way interfere with the possession of the lessees of the property under the lease made for the season of 1896.* The order also referred to some claims made by a party designated as The Arbuckle-Ryan Company for certain improvements and repairs upon the railway property in putting it in operation for the season of 1896, and ordered a reference to a master to take an account of said claim, with the evident purpose of adjudicating it and enforcing it as a lien upon appellant's property. (We refer the Court to this order in full, in the printed Transcript, pages 85 to 86). The appellant declined to comply with the terms of this order of July 15, 1896, and on April 17, 1897, the order, so far as it directed the restoration of the property to the appellant upon the giving of the bond required, was set aside because it had not been complied with (87).

The jurisdiction of the Court having been retained up to the time thus far indicated, and then prolonged throughout the year of 1897, on the sole theory that the suit should not be dismissed and the appellant's property restored to it until the appellant had first paid all of the receiver's indebtedness and the expenses and costs of the suit, a new reason arose in the mind of the Court why the suit *could not* be abandoned: the reports of the masters had revealed that

there was not a sufficient available fund in the hands of the receiver with which to satisfy the receiver's certificates and "other necessary charges upon the fund," so that it would be *"necessary to sell the railroad and the other real estate and fixtures belonging to The Put-in-Bay Water Works, Light and Railway Company, in order to raise a fund necessary to completely satisfy the charges"*; and matters "standing in the way of final disposition" were the cross petition of Arbuckle, Ryan & Co. and the intervening petitions of others having claims which were liens upon the property. These parties were now pressing the Court for recognition of their claims and for the adjudication of their rights to the property which was in the hands of the Court. In this situation, the Court handed down its opinion on January 31, 1898, holding that, inasmuch as it was in actual custody of the property, *although unlawfully*, and as it had been retaining the property in its unlawful possession endeavoring to bring the case into such a condition that it could be dismissed for want of jurisdiction, and while recognizing that there was no jurisdiction to proceed and decree any relief upon the original bill, the Court still had jurisdiction "to remedy the mischief which had been wrought by taking and exercising the jurisdiction, so as to prevent certain persons, who had acted in good faith upon the action of the Court while it was in possession on *apparent* jurisdiction, from suffering injury."

The conclusion of the Court was that it was its duty to take cognizance of the intervening petitions and to determine the validity of the claims therein asserted, and, if found valid, give them due effect by affording the petitioners appropriate relief.

We have come, then, to the real propositions of law which are to be considered on this appeal:

1. Did the Circuit Court have the legal power, in view of Section 5 of the Act of March 3, 1875, and the circumstances of this case, to refuse to dismiss the cause and restore to the appellant its property until the appellant should pay the debts and expenses of the receivership and the costs of the suit?

2. Did it have the power, in view of Section 5 of the Act of March 3, 1875, and the circumstances of this case, to hear and adjudicate the liens which it enforced, and to subject the appellant's property by sale to the payment of those liens?

I

Was the appellant's property subject to a jurisdiction for an account of the proceeds of the receiver's certificates and for a sale of the appellant's property for the payment of the receiver's debts, to any extent?

If Section 5 of the Act of March 3, 1875, was enacted for any purpose at all, and if the repeated decisions of this Court construing and enforcing that enactment mean anything, then, in the face of the proof in the record in this case, there was an *absolute want of power* in the Circuit Court to adjudicate anything, or to make any order except one for an unqualified dismissal of the suit and perhaps for the payment of costs. Beyond the matter of costs, no question as to what equity might require could be considered or enforced, as a condition precedent to the dismissal of the suit and the surrender of the property to the custody of the State court. And in advancing this proposition, we are not unmindful of the established doctrine, as laid down in

Mail Co. vs. Flanders, 12 Wall. 130, that a court has the inherent jurisdiction of setting aside such orders as it may have made improperly before the want of jurisdiction was discovered, and restoring things to the state in which they were before the improper orders were made. This doctrine is discussed in another part of this brief.

It can not be claimed that the Circuit Court of Appeals made a decision as to the payment of the receiver's certificates which could be conclusive on this appeal; for, by a majority opinion (Judges Lurton and Taft), that court expressly refused to make any order beyond directing the injunction to be dissolved (68, 69).

We have here purely a question of *power to act*, and within that power no consideration could be had by the Court of what the receiver had done, and no decree could be entered for his relief, to the extent of holding and subjecting to that relief the appellant's property. The receiver was the officer of the Court, and, without jurisdiction, *there was no court, and no receiver.* The Court could only do what the statute prescribed, and that was to dismiss the case, with such order as to costs as should be just, leaving the parties in interest with such remedies as they might be entitled to in some other jurisdiction. *Williams vs. Nottawa*, 104 U. S. 209, 212.

This Court has declared in *Farmington vs. Pillsbury*, 114 U. S. 138, 144, 145, that the law referred to "is equivalent to an express enactment by Congress that a circuit court shall not have jurisdiction of suits which do not really and actually involve disputes or controversies of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the Act. In positive lan-

guage it provides that, if the assignment (suit) is collusive, the court will not proceed in the case." This rule is inflexible and without exception, to use the language of Mr. Justice Harlan, in the case of *Morris vs. Gilmer*, 129 U. S. 315, 325. When the fact of want of jurisdiction appears, "the circuit court can not maintain cognizance of the suit." *Anderson vs. Watt*, 138 U. S. 694, 702. The statute was enacted not only to protect the court, but also *the parties*, from a fraud upon the court's jurisdiction; and when the fraud occurs it is the duty of the court to stop all further proceedings, remitting the parties to their original rights, and to the remedies to which they are elsewhere entitled. *Williams vs. Nottawa*, 104 U. S. 209, 212, 213.

The policy underlying the mandatory words of the statute that the court "shall proceed no further therein, but shall dismiss the suit," thus leaving no margin of discretion to pause and consider, is forcibly vindicated by what has resulted in this very case by undertaking to qualify that command. The special jurisdiction which a sense of equity seemed to dictate, in the mind of the Court, as proper for the protection of some part of the receiver's debts, once undertaken, begat the further jurisdiction of protecting intervenors who, because the Court was continuing its wrongful custody of the property, were forced to go into the case to assert their claims against the property; and these two special jurisdictions, uniting in transcending the statute, begat as full and complete a jurisdiction as the Circuit Could would have possessed in the matter if no defect whatever had existed in its power to act. The statute was nullified absolutely; its observance existed only in the words alluding to it.

To follow out our contention that the Circuit Court had absolutely no power to retain the appellant's property as a security for the payment of any part of the receiver's indebtedness, we desire to call more particular attention to that feature of the case which relates to Section 720 of the Revised Statutes of the United States.

The record shows that the restraining order was allowed and the receiver was appointed entirely upon the statement of facts embodied in the answer and cross bill of J. K. Tillotson. (See printed Transcript, page 11.) In other words, the original bill, setting up a material man's lien and seeking a marshalling of liens, was not considered at all; the original bill was a mere pretense for the suit, filed expressly to enable Tillotson to bring into the Federal Court, by way of his cross bill, his controversy with The Put-in-Bay Water Works, Light and Railway Company and Carrothers and others over the ownership of the stock and bonds of the Company and over the right to the management and possession of its property; and the restraining order was allowed and the receivership was created wholly upon that cross bill, involving the identical dispute, and parties, and property over which the Common Pleas Court of Ottawa County, Ohio, had already acquired jurisdiction. It was for the very purpose of eluding the jurisdiction of the State court that the suit here was collusively made and the appointment of a receiver obtained. Judge Swan, in his opinion as delivered on the appeal to the Circuit Court of Appeals, presents the matter very forcibly: "The real and responsible offenders against the Act of Congress are Tillotson and Richardson, who devised and procured the scheme apparently for the purpose of avoiding the effect of the action of replevin and of the suit in equity in the State

court, in the latter of which, as the record shows, Tillotson was still under injunction from interfering with the operation of the railroad, to the control of which he asserted substantially the same rights as those pleaded in his cross bill here. That litigation appears to be still pending and constitutes an insuperable obstacle to the jurisdiction of the Circuit Court of the United States to appoint a receiver of the railroad or otherwise interfere with the possession acquired by the action of replevin, or with the effect of the injunction, or in any manner to nullify its action in any equitable suit. *Every issue presented by the cross bill as to the respective rights of Tillotson, appellants Carrothers and Warner was open to contest in either the action of replevin or the suit in equity in the State court, if not in both.* For these reasons it is obvious that the Circuit Court had no jurisdiction of this suit or its dependency, the cross bill, and its order awarding the injunction and its refusal to dissolve the same was erroneous and must be vacated and set aside, and the original and cross bills should be dismissed without prejudice."

The restraining order and the appointment of the receiver were, therefore, a positive violation of Section 720 of the Revised Statutes.

Biggs vs. Walcott, 4 Cranch 179.

Peck vs. Jenness, 7 How. 625.

Haines vs. Carpenter, 91 U. S. 254.

Dial vs. Reynolds, 96 U. S. 340.

The latest expression by this Court of the general rule which Section 720 was intended to enforce is found in the *Chetwood Case*, 165 U. S. 443, where it is embodied in the syllabus in these words: "Where the jurisdiction of the court and the right of a plaintiff to prosecute his suit in it, once attach, the right can not be arrested or taken away by proceedings in another court. When property is in the possession of a court of competent jurisdiction, that pos-

session can not be disturbed by process out of another court of concurrent jurisdiction."

The words "writ of injunction," as used in the statute, include every process or order, irrespective of the form, the effect of which is to stay proceedings in a state court. *Ex parte Schulenberg*, 25 Fed. Rep., 211. The words of the statute are not merely an inhibition against an injunction, but against preventing a party from conducting his proceedings in a state court, which the appointment of receiver herein certainly did. *Fisk vs. Railway Co.*, 6 Blatch. 362. By the service of the writ of replevin issued from the State court, the property came into the custody and possession of that court for all purposes of jurisdiction in that case, and no other court had a right to interfere with that possession, except a court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises. The State court having placed the property in the possession of the officers of the Railway Company as against the claim of Tillotson, by a *writ of replevin*, the United States Circuit Court in this case had no jurisdiction to issue an injunction or to appoint a receiver by means of which the Company and its officers were prevented from using and operating the railway property which the State court had directed its officers to place in their hands. *Domestic and Foreign Missionary Society vs. Hinman*, 13 Fed. Rep. 161.

The case was plainly one for the application of the rule that the court which first takes cognizance of a controversy is entitled to retain jurisdiction until the end of the litigation, and to take possession and control of the subject-matter of the investigation, to the exclusion of all interference by other courts of co-ordinate jurisdiction.

Judd vs. Telegraph Co., 31 Fed. Rep. 182

Hagan vs. Lucas, 10 Pet. 400.

Taylor vs. Carryll, 20 How. 583.

Buck vs. Colbath, 3 Wall. 341.

"The mere forcible continuance of possession wrongfully acquired by the Federal Court did not transform that which was in the first instance wrongful into a rightful possession."

Shields vs. Coleman, 157 U. S. 168.

The doctrine applied in a case of conflicting jurisdiction in *Heidritter vs. Elizabeth Oilcloth Co.*, 112 U. S. 294, would seem to have an important bearing upon the question presented here: "Where proceedings *in rem* are commenced in a state court and analogous proceeding *in rem* in a court of the United States, against the same property, exclusive jurisdiction for the purposes of its own suit is acquired by the court which first takes possession of the *res;* and while acts of the other court thereafter, necessary to preserve the existence of a statutory right, may be supported, its other acts in assuming to proceed to judgment and to dispose of the property convey no title."

We think it follows irresistibly from the foregoing premises that the receivership created in this suit was a nullity, and that the Circuit Court was not justified in refusing obedience to the mandatory provisions of Section 5 of the Act of March 3, 1875, as a means of enforcing the payment by the appellant of any indebtedness the receiver had contracted.

Can anything be said to uphold the refusal to dismiss the suit because the costs were not paid by the appellant? Whatever may be the power of a circuit court to enter an order for costs in dismissing a suit for want of jurisdiction under Section 5 of the Act of March 3, 1875, no pre-

cedent can be found for decreeing the entire costs against the prevailing party; nor, indeed, any part of the costs, where the prevailing party was early and earnest in his objection to the jurisdiction of the court, as the record here shows this appellant to have been. We cannot discover anything in the circumstances of this case which would shield the assessment of the costs as ordered as being within the statutory expression "such order as to costs as shall be just."

Inglee vs. Coolidge, 2 Wheat. 263.
Mayor vs. Cooper, 6 Wall. 247.
Railway Co. vs. Swann, 111 U. S. 379.
Elk vs. Wilkins, 112 U. S. 98.
Smith vs. Whitney, 116 U. S. 175.
Citizens' Bank vs. Cannon, 164 U. S. 319.

II.

Did the Circuit Court have the power to retain the suit and the property because other parties having claims upon the property had intervened and were entitled to protection?

The cross petition of Arbuckle, Ryan & Company and the intervening petitions of Barbour & Starr, The Bodefield Belting Company, and Frank Holt, Treasurer, and The Atlantic Trust Company, whose claims were adjudicated and allowed, were, of course, dependent upon the jurisdiction taken upon the original bill; and it was conceded that the general rule is that when the original bill falls, all dependent bills fall with it. But the theory, stated in its last analysis, upon which this rule was disregarded in this instance, was this: These intervenors having been forced into this proceeding because this particular Court had the

actual custody of the property, and it now being discovered that such custody is unlawful, still this Court may retain that unlawful custody for the special purpose of adjudicating and enforcing the payment of the claims set up by said intervenors against said property. The opinion of the Court, to this effect, which was upheld and enforced to the extent of an adjudication which resulted in a sale of appellant's property and as complete an exercise of jurisdiction as if the original bill had been an honest one, appears in full in the Transcript of the Record, pages 93-96, and is reported in 84 Fed. Rep. 740.

Aside from the proposition of law which it embodies and which we are to meet, we desire to correct an apparent error in its statement of the facts, though perhaps not material. The intervenors whose claims were adjudicated and enforced under the special jurisdiction explained were Arbuckle, Ryan & Company, Barbour & Starr, The Bodefield Belting Company, and Frank Holt, Treasurer of Ottawa County. Arbuckle, Ryan & Company were original parties to the bill, and their claim was first set up by an answer and cross petition filed September 30, 1892, less than a month after the original bill had been filed, and four days after the answers had been filed which set forth the lack of jurisdiction. The firm of Barbour & Starr did not intervene until February 2, 1893, and The Bodefield Belting Company until April 7, 1893, at which date the appeal on the question of jurisdiction was pending in the Circuit Court of Appeals. Holt, Treasurer, did not intervene until December 29, 1897. It would therefore seem to be difficult to regard any of these claimants as within the category of those persons who had in good faith come into the Court under an apparent jurisdiction; and as the claimants

specified above are the only intervenors, aside from those persons holding receivers' certificates, who have been benefited by the decrees complained of in this cause, it is not necessary to consider any others in this connection.

The Atlantic Trust Company, however, stands in a unique position as an intervenor in the case. While it was the trustee for the holders of the bonds secured by first mortgage on the property involved and in that fiduciary relation held an interest adverse to the priority of the lien asserted by Arbuckle, Ryan & Company, its intervening petition was not filed until April 2, 1898 (100-107), and then under circumstances savoring strongly of collusion with Arbuckle, Ryan & Company. (See the suggestions of Simon Baruch, page 107, and the motion on pages 120-121). A judgment *pro confesso* was rendered on this intervening petition December 12, 1899 (127-128), but the fund finally distributed, derived from the sale of the property, did not in any way benefit The Atlantic Trust Company. (For the decree of distribution, see pages 134-136).

In reading the opinion to which we are referring, the suggestion occurs at once to ask why the intervening petitioners would have been wronged if the suit had been dismissed? They could have enforced their claims in another court, if the property had been released from its present illegal custody. If the statute of limitations had expired as to some of them pending the appellant's incessant struggle of seven years to have this suit dismissed and the property released, it was not the fault of the appellant which had caused the intervenors the wrong which would have resulted to them from an ultimate dismissal of the suit. The fault, in such case, was the Court's refusal to surrender its unlawful custody promptly; so that, after all, the question goes back

to the validity of the original reason for not dismissing the suit, namely, the refusal of the appellant to pay the receiver's debts and charges and the costs.

In saying that the theory of the opinion conceded the unlawfulness of the Court's possession of the property, we think we are entirely fair. Observe the Court's own statement explaining its special jurisdiction on page 95 of the Transcript:" If this question be considered upon the ground of the right of a third party to intervene for protection of his own interest in the pending suit, it would seem to be immaterial whether the possession of the property which the court had taken into custody was rightful or not, or whether the maintenance of possession could be justified upon legal ground. It is the fact of *actual possession* which the court has taken, and that alone, which gives the intervenor his right to appear and be heard, and to have his rights ascertained and awarded to him." The Court then cites the decision of this Court in *Gumbel vs. Pitkin*, 124 U. S. 131, and gives its understanding of that decision, and continues: "That case illustrates in a very forcible manner the fact that the question of lawfulness or unlawfulness *of the holding of possession by the court* is wholly immaterial."

While we are confident that this interpretation of the decision in *Gumbel vs. Pitkin* is erroneous, we do not care to more than mention the Court's use of it; for the point which we make is, that if there was no other reason for the unlawful holding of the property by the Court, the one fact that there were intervening petitioners seeking the Court for the enforcement of their liens against the property unlawfully held would not have been a valid reason for refusing to dismiss their petitions, together with the original bill, and to release the illegal custody of the property, thus leaving all parties to seek their remedies in the proper jurisdiction

elsewhere. This is what answers negatively the question placed in the heading of this argument, and leaves the special jurisdiction to rest alone upon the refusal to dismiss unless the appellant should pay the receiver's debts and charges and the costs of the suit.

III.

Has the Circuit Court a legal discretion as to proceeding no further and dismissing the suit, when it appears to its satisfaction that there is no jurisdiction?

It may be claimed that the statute by its express terms leaves the court to dismiss or remand the suit "as justice may require," and that justice did not require it under the circumstances of this particular case. Still this Court would have a question of jurisdiction to consider in reviewing what was considered sufficient to justify a continued exercise of jurisdiction. And perhaps it will also be claimed that the Circuit Court in this case was only exercising its inherent power to right the wrongs which may have been done to parties before the want of jurisdiction was discovered. In this state of anticipation, we proceed.

It has been shown that the intervenors could have been restored to their original rights by a *prompt* dismissal of the suit and surrender of the property to the jurisdiction of the State court from which it had been taken; and if the delay in this deprived the intervenors of any legal rights by reason of the lapse of time, then the complete answer is, that the wrong done them was done by the Court *after* the want of jurisdiction was discovered, and in such case the rule as to inherent jurisdiction to correct wrongs could not apply.

So that again and again we are brought back to the matter of the receivership and the costs of the suit, and there is nothing else in the case to be discussed.

We are satisfied that what we have already said has demonstrated that the fact that the State court first acquired jurisdiction over this cause and the parties and the property involved rendered the receivership in this proceeding *nugatory and void*, according to the Act of Congress and the decisions of this tribunal of last resort. Considering the manner in which the custody of appellant's property was acquired by the Circuit Court, its power over that property was so completely lacking that its sale thereof and the title it has undertaken to confer upon the purchasers are absolutely void. *Hendritter vs. Elizabeth Oilcloth Co.*, 112 U. S. 294. By the same token, *no valid lien under the order for the issuance of receiver's certificates was created.* And so we assert with confidence that whatever discretion the words of Section 5 of the Act of March 3, 1875, gave the Court in directing a dismissal of this suit "as justice may require," and whatever power the Court had inherently to order restitution of wrongs which had arisen by an abuse of jurisdiction, Section 720 of the Revised Statutes and the decisions construing it prohibited in emphatic terms the continued custody of the appellant's property, and rendered its appropriation to the satisfaction of the final decrees herein illegal and of no effect.

What "justice may require," under the statute, and what "restitution" a court has an inherent power to order in correcting its erroneous judgments, are not to be understood in a paradoxical sense; a duty to dismiss a cause for want of jurisdiction is not to be thwarted by the duty not to dismiss because some wrong cannot be wholly repaired by a dis-

missal. The judgment *ex necessitate* is to be reversed, and where the action is *in rem,* the *res* is at all events to be released, and the restitution is to be enforced, not by the continuance of the jurisdiction which was wrongful, but by some summary means adopted by the court independently of the suit with which it had no power to proceed; by a writ of restitution, where the money has been paid and there is a certainty as to what has been lost; by a *scire facias* where it is necessary to discover what is to be restored; and circumstances may exist where an action may be sustained to recover back the money. *Northwestern Fuel Co. vs. Brock,* 139 U. S. 216, 220.

But the remedy is *in personam,* by a summary procedure, and can never be the exact exercise of the very jurisdiction which is denied.

U. S. Bank vs. Washington Bank, 6 Pet. 8-17.

In re Morris' Cotton, 8 Wall. 507.

Ex parte Morris, 9 Wall. 605.

Mail Co. v. Flanders, 12 Wall. 130.

Northwestern Fuel Co. vs. Brock, 139 U. S. 216.

The effort of the court must be to restore things to the state in which they were before the improper orders were made; to correct those things which it had no right to do in the first instance; to restore things to their original status *as far as practicable*—but always this, that, in directing restitution, "no further wrong must be committed." *Northwestern Fuel Co. v. Brock,* 139 U. S. 216, 220.

The foremost party imposed upon was the appellant. By a fraud committed upon it and the Court by parties who were allowed to retire with perfect immunity from punishment and pecuniary loss, the appellant was deprived of the possession and earnings of its property for seven years,

at an expense and enforced liability, embracing even the compensation of the tortious custodian and his attorneys, and aggregating many thousands of dollars, as the receiver's accounts would show, were they all in the record.

It was a strange conception of justice that fastened upon this appellant a liabilty for any part of the receiver's debts. For of all the parties to the suit, the appellant above every other was least to blame for the creation of the receivership. The receivership was the prime motive in the conspiracy against the appellant in the collusive institution of this suit, and no principle of waiver or estoppel can be discovered in the action of appellant's constant protest against that collusion, which the record attests.

If some party had to be fixed upon as responsible for the redemption of the certificates, the receiver himself was not free from blame; for it requires no close scrutiny of the record to discover a grave suspicion as to his good faith. His appointment was made contemporaneously with the filing of the collusive cross bill, under circumstances of pre-arrangement which necessarily connected him with Tillotson's dishonest scheme; for he must have been at the threshold of the court when the application for his appointment was made and granted, as his bond was filed at once with one of Tillotson's own attorneys as the sole surety thereon. His connection with Tillotson is made apparent by the fact that the same attorneys who represented Tillotson represented him when his first request was made for authority to issue certificates (28-30). Why, therefore, was he not bound by their notice of the fraud by which the jurisdiction of the Circuit Court had been secured? The first order for the issue of certificates was made October 15, 1892, or twenty days after the answers

of the Put-in-Bay Water Works, Light and Railway Company and Carrothers had been filed to the original bill and Tillotson's cross bill, exposing the want of jurisdiction. These attorneys, as the common counsel of Tillotson and the receiver, were bound to take notice of those answers and of what they contained. Their knowledge was the knowledge of their clients, so far as it concerned the responsibility for the creation of debts which, for lack of jurisdiction in the court, could not legally be fastened as a lien upon the property in the custody of the receiver, when the day of final judgment should come. With this notice as a warning, the certificates were negotiated and their proceeds used. The second petition for authority to issue additional certificates was filed for the receiver by the same common counsel on December 21, 1892, and was granted at the same hearing, on the following day, at which the motions to dissolve the restraining order and to discharge the receiver were overruled, after the presentation of the identical evidence which subsequently the Circuit Court of Appeals pronounced to be conclusive proof of an utter lack of jurisdiction. This notice was certainly binding as a warning to the receiver to have a care in negotiating his certificates. We submit, with all due respect to the judicial conclusions which appear in this record, that there was a want of careful discernment regarding the conduct of the receiver, when the anxiety to protect the holders of his certificates arose.

There were no innocent holders of these certificates, so far as the appellant's rights were involved. They were not negotiable within the meaning of the law merchant. The purchasers, as a matter of law, took them subject to the final action of the court in regard to them.

Union Trust Co. v. Railway Co., 117 U. S. 434.

Railroad Co. v. Howard, 7 Wall. 392, 415.

Bank of Montreal v. Thayer, 7 Fed. Rep. 622.

Mercantile Trust Co. v. Railroad Co., 58 Fed. Rep. 11; 7 C. C. A. 3.

Gordon v. Newman, 68 Fed. Rep. 686, 689.

Buyers of such certificates must look out. They are bound to take notice of the lack of jurisdiction in the court over the property upon which the certificates purport to be a lien; they occupy no better position than a purchaser of property under a void judgment. There could be no equity, short of an estoppel, that would make an obligation, legally ineffective, enforcable as a lien upon a fund; and no estoppel existed here. No controlling equity arose from the mere fact that some part of the proceeds of the certificates may have been used to care for the appellant's property or to improve it; it requires authority on the part of an alleged trustee, or acquiescence of a clear kind on the part of the beneficiary, to charge an estate with expenditures or improvements; the fact that the estate was benefited or enriched goes for nothing in itself.

"A trustee will not be reimbursed for improvements on land of which he has tortiously retained possession."

Tatum v. McLellan, 56 Minn. 352.

"Where a party tortiously retains the title to property which he knows he ought to convey to another, he is not to be compensated for improvements made while he so retains possession."

Thompson v. Thompson, 16 Wis. 91.

It is a maxim that no man can make himself the creditor of another against the latter's consent.

The very character of the suit itself—a bill to foreclose a material man's lien and a cross bill to recover the possea-

sion of a corporation's stock and bonds—placed a cloud upon the validity of the receiver's certificates; no public welfare was involved.

Hanna v. Trust Co., 70 Fed. Rep. 2.

Wood v. Safe Deposit Co., 128 U. S. 416.

Especially as against the holders of mortgage bonds who were neither parties nor privies to the suit when the order creating the certificates as a first lien on the mortgaged property was made; a feature of this case which the recreant trustee for the holders of the bonds, when it entered its appearance at the instance of an antagonistic party to bolster up the unlawful jurisdiction, passed by in silence.

But the originators of all the unfortunate confusion shown in this record were overlooked and have so far escaped scot free. Why, in the exercise of an inherent jurisdiction to direct and enforce restitution, should Tillotson and The Electrical Supply Company have been overlooked? No consideration of justice could properly allow them to escape the costs and penalties of this collusive suit, nor full responsibility for every dollar of the indebtedness created by the certificates which by fraud they induced the court to create and place upon the market. They are still within the reach of the Circuit Court and subject to its summary order to repair the injuries they have wrought.

IV.

As to the restitution which this Court should direct, if the prayer of this appeal is granted.

If the questions which we have propounded as the headings to our argument are to be answered in the negative, it would follow, of course, that the sale of the appellant's property is void. The purchasers are parties to this appeal; they are the surviving partners of the firm of Arbuckle, Ryan & Co., and were prominently parties to this suit from its commencement to its end, combatting at all times the appellant's objection to the jurisdiction of the court. They are not even *third* parties, in their attitude as purchasers. They were actively instrumental in forcing the sale against the appellant's complaint, and against the conclusive finding of wrong by the Circuit Court of Appeals, and became purchasers and parted with their money, not only with full notice, but in energetic defiance of this appeal.

If we understand the law, it must follow that restitution will be ordered, not only of the property itself, but, against the proper parties, of all moneys which were the earnings of that property and were appropriated to the payment of the receiver's compensation, his attorneys' fees and the costs of the suit. As to the matter of the taxes, the return of the moneys paid would seem to meet a set-off in the fact of their being the appellant's debt, and there the matter may rest.

That the sale was void and conveyed no title, if jurisdiction was wanting:

Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294.

That restitution of the property and the moneys paid will

at least be directed by this Court to be ordered by the Court below:

U. S. Bank v. Bank of Washington, 6 Pet. 8.

In re Morris, 8 Wall. 507.

Ex parte Morris, 9 Wall. 605.

Mail Co. v. Flanders, 12 Wall. 130.

Northwestern Fuel Co. v. Brack, 139 U. S. 216.

Baltimore Building Assn. v. Alderson, 99 Fed. Rep. 489.

In re Enderlin State Bank, L. R. A. 593, 604.

That the appellant shall recover the costs of this appeal, and as to the costs in the Court below on the dismissal of the suit:

In re Morris, 8 Wall. 507, 511.

Stickney v. Wilt, 23 Wall. 162.

Bradstreet v. Higgins, 114 U. S. 262.

Peper v. Fordyce, 119 U. S. 469.

Chapman v. Barney, 129 U. S. 97.

Respectfully submitted,

JOSEPH B. FORAKER,

WALTER L. GRANGER,

Counsel for Appellant.

No. 332.

Br. of Hamilton for Appellees

Office Supreme Court U. S.
FILED
FEB 12 1901
JAMES H. McKENNEY,
Clerk.

Filed Feb. 12, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 332.

THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, APPELLANT,

vs.

CHARLES W. RYAN AND J. WILLIAM RYAN, SURVIVING PARTNERS OF THE LATE PARTNERSHIP OF ARBUCKLE, RYAN & CO., ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLEES.

J. K. HAMILTON,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

THE PUT-IN-BAY WATER WORKS, LIGHT and RAILWAY COMPANY, *Appellant*,

vs.

CHARLES W. RYAN and J. WILLIAM RYAN, surviving partners of the late partnership of ARBUCKLE, RYAN & COMPANY, ET AL. *Appellees.*

On Appeal.

No. 332.

Brief for Appellees.

This controversy grows out of a project for building two miles of electric railway, together with a lighting and power plant, on Put-in-Bay Island, in Lake Erie, Ohio.

No stock of the railroad company was ever subscribed and paid for as required by Section 3243 of the Revised Statutes of Ohio, which provides that, "ten per cent on each share of the capital stock shall be paid for at the time of making the subscription, and the residue thereof shall be paid for in such installments as may be required by the directors." See Printed Record, pp. 5 and 21.

One J. K. Tillotson had made a contract by which he was to build the railroad for the stock and bonds, and he had in

turn contracted with The Industrial Mining and Guaranty Company and John H. Carrothers, by which they were to sell the stock and bonds to raise money for the railroad construction. Tillotson in his Cross Bill asserted that they had failed to carry out their contract and that they never paid in more than $15,000.00 on their agreement. The record shows, as we assert, that all the rest of the money put into the railroad was contributed by the contractors and laborers. The contractors set up their mechanics' liens in this case and the laborers' liens have been paid by the proceeds of the sale of the Receiver's Certificates, as will hereinafter be shown by the Record.

The case, after having been in the Courts below for eight years, is here at last solely on the question of jurisdiction, and this Court is asked to set aside, vacate and hold void every order, act, decree, cost and expense incurred during all these years to preserve and improve the railroad property, and to turn the same over to the merely nominal owners of the stock.

I appear for Charles W. Ryan and J. William Ryan, purchasers of the property, who are named in the petition for appeal, as surviving partners of Arbuckle, Ryan & Co., and for M. V. Barbour and Rowland Starr, partners as Barbour & Starr.

I wish to call the attention of the Court to the record as to the parties. Reference to the original bill of complaint (Printed Record 1-3) and to the final decree (Record 134-136) shows that in the Court below the partnership firm of Arbuckle, Ryan & Co. was made one of the parties defendant and that a portion of the final decree was in favor of the partnership as such. Nowhere in the Record in the Court below, nor in this Court, does it appear that said firm was ever dissolved, nor that Charles W. Ryan and J. William Ryan, either as individuals or surviving partners, have been made parties to the case except by the petition for appeal herein, nor has any

suggestion been made at any stage of the proceedings of the death of any individual member of the said firm. It is suggested that the proper parties are not before the Court.

CORRECTED STATEMENT OF FACTS.

The statement of the case as made in the Brief filed herein by the Appellant is, in the main, an accurate statement of the controversy, but in a few matters we desire to correct errors inadvertently appearing therein, and also to supplement such statement in a few respects.

On page six of Appellant's Brief it is stated that in the Answer filed by the Railway Company to the original Bill, denial was made that the value of the material furnished was $2787.04, but amounted in value to only about the sum of $700.00, and no more. We desire to call attention to the fact that this latter allegation was made on information and belief only. (Record 17.)

The statement is made on page nine of the Brief that the affidavit of Carrothers (Record 32-38) in support of the motion to dissolve the injunction stated that Tillotson was, on the 3rd of September, enjoined by an injunction issued by the Common Pleas Court of Ottawa County, Ohio, from further interfering with the Company's operation of said railway. This statement is not strictly correct. Reference to the affidavit (Record 37-38) shows that the statement therein reads as follows:

"Thereupon and to prevent the said Tillotson, his agents and servants, from such unlawful and forcible interference with the said Company's possession and operation of its property, the said Company obtained from the Common Pleas Court of Ottawa County, Ohio, a restraining order, a certified copy of which is hereto attached, marked Exhibit 'E.'"

The certified copy in question shows that such injunction was to take effect "upon the plaintiff giving an undertaking as provided by law in the sum of $5000.00 to the satisfaction of the Clerk of this Court."

The certificate of the Clerk also appears as a part of said Exhibit, but entirely fails to show, nor does the Record otherwise in any manner or form disclose, that said bond was ever given.

It is needless to say that there was no injunction unless the bond required as a prerequisite was given.

The statement is made on page ten of the Brief that no replications were filed by complainants or Tillotson to the Answers of Carrothers or the Railway Company.

We concede that none were filed by complainant, but Replications denying in toto the allegations of the Answers were filed by Tillotson on June 10th, 1893, both to the Answer of the Railroad Company and to that of Carrothers. These Replications do not seem to be brought into the Printed Record by Counsel for appellant.

On page eleven of the Brief it is stated that the judgment of the Circuit Court of Appeals reversed the judgment of the lower Court and commanded the dissolution of the injunction, because the evidence showed that the Court had no jurisdiction of the cause on account of lack of sufficient jurisdictional amount in complainant's claim, by which the jurisdiction had been invoked, and because of unlawful interference through these proceedings with certain proceedings in replevin and for injunction pending in the State Court.

Reference to the mandate (Record 52) will show that the order of the Court of Appeals was simply one of reversal and dissolution of the injunction, with the direction that the lower Court take further proceedings in conformity with the opinion of that Court.

In addition to the statement of the case as made by counsel for appelant, we desire to call attention to the following:

Arbuckle, Ryan & Company were made parties originally, but *not served with process* until after the Receiver of the Railway property had been appointed, given bond and taken possession of all the property.

They filed their Answer and Cross-Bill September 30th, 1892, asking relief, while the Railroad was in the possession of the Receiver. (Record 42.) Barbour & Starr, for whom with others this brief is filed, came in as intervenors February 18, 1893, the property then being in hands of the Receiver.

On September 26th, 1892, when the Railroad Company filed its Answer, its Answer was not due. The appearance day of the defendant was the first Monday in October, and the rule day for Answer was the first Monday in November, 1892. (Record 4.)

The Receiver took possession on the 10th day of September, 1892, and began immediately investigation of the condition of the property, finding that a number of cars were in Toledo waiting transportation to the Island, on which there were freight charges; that a car house was necessary to protect the cars; that the track needed repairs, &c. In short, that money was absolutely necessary to preserve the property of which he had been put in charge, he himself having already incurred a personal liability for $250.00 to this end. (Record 28.)

On this showing, on the 15th day of October, 1892, he was authorized by the Court to borrow $5000.00 for the preservation and protection of the property, and to issue Certificates therefor, which were made a lien on all the property of the Railroad Company in the hands of the Receiver, superior and prior to all other liens, except taxable costs and expenses of the action.

If the first Report of the Receiver had been carried into the Printed Record, it would disclose that these Certificates thus ordered were negotiated on or prior to October 28th, 1892, as on that day the Receiver charges himself with the proceeds thereof.

On the 29th of October, 1892, the Railway Company filed two motions; one to vacate the injunction allowed on Tillotson's Cross-Bill, and the other to discharge the Receiver. Each motion was based on the same grounds, viz: lack of notice of application, and an allegation that the averments of Tillotson's Cross-Bill were untrue. In neither of these motions was any attack made upon the Court's jurisdiction.

Carrothers's affidavit in support of the motions was filed October 29th, 1892, and the affidavit of Franklin S. Terry, on which ultimately the Circuit Court of Appeals acted, was not filed until the 12th day of November, 1892.

How early the attention of Judge Ricks, or of any other Judge, was called to these motions, does not appear from the Record, save that it appears that the motions aforesaid came on for hearing before Judge Ricks on the 22nd of December, 1892. On this hearing numerous affidavits were heard on both sides, and the judicial conclusion arrived at was that the evidence in support of the motions was insufficient, or was overbalanced by the evidence against the same. These motions were, therefore, both overruled; whereupon an appeal was taken to the Circuit Court of Appeals, which, for the first time, raised the question of jurisdiction. (Record 46.)

At the same date on which these motions were overruled Judge Ricks further authorized the Receiver to borrow an additional $5000.00, for which purpose he was given authority to issue Receiver's Certificates, which were likewise ordered to be established as a lien upon the property.

The facts concerning the appeal and the action of the Circuit Court of Appeals have been correctly stated in Appellant's Brief.

Not until after the mandate from the Circuit Court of Appeals came down do we hear of any action taken by the Railway Company invoking the action of the *Circuit Court* on the question of jurisdiction, although the question had apparently been submitted to the Circuit Court of Appeals.

The Circuit Court promptly dissolved the injunction in compliance with the mandate of the Circuit Court of Appeals, and, apparently, as soon as it was possible to take action upon the motion to dismiss, acted thereon by entering an order conditionally granting the same. (Record 74.)

The Railway Company, not caring to accept the action of the Court which it had invoked, and the summer season being on when the Road could be operated, the Court directed the Receiver to lease the Road for the season of 1893, and, in fact, as it afterwards appeared, leased the Road for operation each season until and including 1899, at the highest price that could be obtained therefor; and the Receiver accounted for the receipts thereof.

On two other occasions applications were made to the Court for orders to set aside the Receivership and to fix bond, by the giving of which the property might be released.

In each instance the Court complied with the request on certain conditions, but those invoking this action of the Court, refused to comply with the terms imposed.

The attitude of Arbuckle, Ryan & Company on these matters is evidenced,

1st. By the serious effort made by said partnership to require the Receiver's Certificates to be surrendered and the case dismissed. (Record 75.)

2nd. By their effort to be permitted to introduce evidence to controvert the allegations of the affidavit of Terry upon the question of jurisdiction of the Court. (Record 91.)

The property finally went to sale. From that sale was realized the sum of $16,501.00, which was distributed as follows: (Record 135-136.)

1—The costs in the case,

2—Receiver's Certificates,

3—Unpaid taxes on the property,

4—100-165ths of the balance to the intervening mechanics and material men as lien-holders,

5—The balance, being 65-165ths of what remained after the payments provided for in 1, 2 and 3 above, was left in the Registry of the Court for its further order. This amount is applicable solely upon the mortgage of Atlantic Trust Company, no other or superior right or lien being now asserted against the same. The amount thus remaining is nearly $2600.00.

We shall refer to this order of distribution further on in the Brief.

ARGUMENT.

I.

We claim that after the cause was remanded from the Circuit Court of Appeals for further proceedings in accordance with its opinion, further proceedings were had in the Circuit Court in accordance with that opinion and direction, and therefore the cause is not now properly before this Court for review.

The Circuit Court of Appeals on the appeal taken to it by The Industrial Mining and Guaranty Company might have dismissed the action had it considered this the proper order to enter in the case.

In re Tampa Suburban Railway Co., 168 U. S., 583.

Castner vs. Koffman, 178 U. S., 168-184.

Smith vs. Vulcan Iron Works, 165 U. S., 518.

U. S. vs. Jahn, 155 U. S., 109.
Robinson vs. Caldwell, 105 U. S., 359.

Instead of so doing, that Court rendered an opinion clearly indicating the right of the lower Court to require payment of those Receiver's Certificates, the proceeds of which had been used in preserving, or making betterments upon, the Railroad property. Furthermore, it did not reverse the order refusing to discharge the receiver, which was equivalent to affirmatively refusing said discharge, since the action of the Circuit Court was all before the Circuit Court of Appeals. Moreover, the Circuit Court of Appeals followed this opinion with a mandate requiring the lower Court to proceed in accordance with it. The lower Court thereafter strictly obeyed such mandate, proceeded no further upon the issues presented by the Bill and Tilbotson's Cross Bill and endeavored in every way to dismiss the case entirely upon payment of the items indicated in the opinion of the Circuit Court of Appeals.

That such procedure by Judge Severens was in accord with the views taken by the Circuit Court of Appeals in its previous decision, is clear from the fact that the Railway Company subsequenty brought a proceeding in Mandamus, in the latter Court, for the purpose of obtaining the definite construction by such Court of its former mandate, and an order upon Judge Severens forthwith to dismiss the case absolutely and without any condition annexed to pay any portion of the Receiver's certificates and expenses.

In this effort the Railway Company was unsuccessful and the Mandamus was denied.

In re, The Put-in-Bay Water Works, Light and Railway Co., 90 Federal Rep., 831.

We suggest to this Court that the opinion of the Circuit Court of Appeals has become the law of this case. The parties were before the Circuit Court of Appeals, the case was before them, and they had the power to decide, as the authorities

above cited show, not only the question of the injunction, but the question of the appointment of the Receiver and the question of jurisdiction. In any event, their mandate to the Circuit Court required that Court to proceed in accordance with their opinion. That opinion, fairly construed, means that the Circuit Court should dismiss the case, conditioned upon the payment of so much of the Receiver's certificates as went to the betterment and preservation of the road.

From such orders and decrees of the Circuit Court as were entered in accordance with that mandate, no appeal lies.

The Aspen Mining, &c., Co. vs. Billings, 150 U. S., 31.
Stump vs. Hornback, 109 Mo., 272.
Paland vs. Chicago, etc., Co., 44 La. Ann., 1003.
Vinard vs. Green, 4 Utah, 458.
Stewart vs. Salaman, 4 Otto, 434.

II.

Proceeding, however, to a consideration of the points mainly argued by appellants, we approach the discussion of two fundamental questions which are thereby presented for solution.

Had the Court below jurisdiction to impress the property with a lien for any part of the costs of the case, or the Receiver's Certificates, and order a sale for the payment of the same?

Regardless of the rightfulness of the Court's possession, did the fact of that possession confer a jurisdiction to adjudicate the claim of any intervenor and adjudge a sale to satisfy such claim?

Bearing in mind that the purchaser of property at judicial sale succeeds to the rights of all lien-holders in the case, an affirmative answer to either of the above questions will support the decree entered in this case and the orders appealed from.

As preliminary to the discussion of the first of the above questions it will be convenient to ascertain to what extent the Receiver's Certificates were valid.

WAS THE APPOINTMENT OF THE RECEIVER ABSOLUTELY VOID?

The claim of Appellant's Counsel is that the Receiver's appointment was absolutely void; that he was a trespasser; that his conduct was tortious; that he had no rights that anybody was bound to respect, and that no rights could be acquired by any one from or under him.

This argument is based upon the claim that the Court below was without jurisdiction of the main controversy and therefore without jurisdiction of any of its incidents.

This contention will not stand a critical examination of the facts of the case.

The objections presented by the argument of Counsel for Appellant, to the jurisdiction of the lower Court over the main controversy may be classed as follows:—

1. That the pendency of an action for replevin in a State Court prevented the Federal Court from taking jurisdiction;

2 That the pendency of certain injunction proceedings in, and the issuing of a writ of injunction from, a State Court in like manner prevented the Federal Court from taking jurisdiction;

3. That the amount involved was below the Court's jurisdiction;

4. That there was collusion between the original complainant and Tillotson, whereby a case was presented for the action of the Federal Court, which was, not in fact, cognizable by that Court.

These objections may again be re-classified as objections to the jurisdiction of the United States Court to determine,

1. The controversy presented upon the Cross Bill of Tillotson, and

2. The controversy presented by the original Bill of Complainant.

THE PENDENCY OF THE REPLEVIN CASE WAS NO BAR TO THE JURISDICTION OF THE UNITED STATES COURT.

The only proof of the existence or pendency of any replevin proceedings lies in the answer of Carrothers to the Cross Bill of Tillotson (Record 20), and the statements regarding the same matter contained in the affidavit of Carrothers. (Record 35).

These statements are in substance merely that the defendant Railway Company, through its President, secured possession of the personal property of said Company by means of a proceeding in replevin. Considerable stress is laid upon the pendency of this replevin proceeding, by Counsel for Appellant, who (page 25 of their Brief) say that the Cross Bill was filed to evade certain replevin proceedings then, and still, pending in the State Court, between the same parties, and involving the same controversy, and that these facts were never denied.

On the matter of denial, it is perhaps enough to say that there was no call for any denial, inasmuch as the averments of the Answer and Affidavit referred to, were to the effect that it was the *Company* that was in possession of the property and not that said property was in the possession of another tribunal; and, further, said averments further utterly failed to show where the replevin proceedings were instituted, whether they were still pending and whether, or not, the controversy hereby presented was, in fact, identical with that presented by the Cross Bill of Tillotson.

Again, the property taken possession of by the Receiver in this case never came into the custody of the Court of Common Pleas of Ottawa County, Ohio, by virtue of any writ of replevin, nor was that property in controversy in the Replevin proceedings.

The property taken possession of by the Receiver was the Railroad and property described in the original Bill (Record 2); that is, the Power House building, situate on lots 471, 472, 473, 474 and 475, in Victory Park Addition to Put-in-Bay Island, and the poles, ties, tracks and other structures of the Railway Company upon Put-in-Bay Island, including all the property of the defendant Company.

Mr. Carrothers never testified, and there is no other evidence to show that the Railroad, the tracks, ties, poles, and power house were replevied. Carrothers does say in his Answer to the Cross Bill of Tillotson that he obtained possession of the Railroad by virtue of the writ of Replevin, (p. 20 of Record). But in his affidavit his statement is that, as President, he did institute replevin proceedings to obtain possession of the personal property of the Company. (Record p. 35).

The absurd proposition seems to be now maintained that the electric railway, such as this was, and the power house, where the motive power for the Railway was generated, and the lots or real estate upon which it was situate, were all subject to a writ of replevin. I quote the contention of Appellant (page 36 of his Brief):

"By the service of the writ of replevin issued from the State Court, the property came into the custody and possession of that court for all purposes of jurisdiction in that case, and no other court had a right to interfere with that possession except a court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises. The state court having placed the property in the possession of the officers of the Railway Company as against the claim of Tillotson, *by a writ of replevin*, the United States

Circuit Court in this case had no jurisdiction to issue an injunction or to appoint a Receiver by means of which the Company and its officers were prevented from using and operating the railway property, which the State Court had directed its officers to place in their hands."

Counsel certainly for the moment must have forgotten the law, supposed to be well known to every lawyer, when he asserts the above doctrine.

This railway and the lots of land never came into the custody of the State Court. The State Court certainly never placed the railroad and the lots in the possession of the officers of the Railway Company by a writ of replevin.

The original petition in the case, all the cross-petitions and the intervening petitions, were suits to enforce mechanics' or equitable liens against the Railroad, its rights of way and buildings, with the land on which same were situate.

The Amended Answer and Cross Bill of Arbuckle, Ryan & Company (Record 117) asserted their lien against the power plant and the lots of land upon which the same is situated, under Section 3184, Revised Statutes of Ohio, which reads as follows:

"A person who performs labor, or furnishes machinery or material for constructing, altering or repairing * * * * or for erecting, altering, repairing, or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure * * * by virtue of a contract with the owner, or his authorized agent, shall have a lien to secure the payment of same upon such * * * * house, mill, manufactory, or other building, or appurtenance, fixture, bridge, or other structure * * * and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

The Receiver was put in possession of the entire Railroad and its road-bed, poles, wires, rails and cars, as well as the

power house and machinery thereon and the lots upon which the same was situate. If there was any replevin suit started, it could affect only personal property, and the liens thus asserted against this power house and the lots on which it stood could certainly not have been determined therein.

As to what particular personal property was taken possession of by that alleged writ of replevin, we are left wholly in the dark, but even if the cars had been taken possession of, under the practice in Ohio they would be turned over to the plaintiff in such replevin suit, to-wit: the Railway Company, upon its execution of a bond, the bond thus executed taking the place of the property itself. The suit at law would proceed simply between the plaintiff and the defendant to determine who should recover judgment against the other. If the plaintiff recovered, his recovery would be the damages for the unlawful detention of the property by the defendant. If the defendant recovered, his damages would be the value of the property, for which he would have right of action against the bond. But in no event would the defendant recover back the possession of the property itself. By the delivery of the property to the plaintiff under the replevin writ, the property became the plaintiff's absolutely, could be proceeded against in any suit, and could be levied upon as any other property of the plaintiff, to the extent of his interest therein, but in a replevin suit no liens could be marshaled upon the property itself. That is, the *res* is not held for further disposition by the Court.

The action of Replevin was, in 1892, provided for by Sections 5814 to 5831, Revised Statutes of Ohio, being Chapter XI, Division 7, Title 1.

Section 5814 provided, "When possession of *personal property* may be recovered in an action as provided in this chapter."

Section 5816 provided: "The order for the delivery of the property to the plaintiff shall be addressed and delivered to the sheriff; and it shall contain the names of the parties, and the court in which the action is brought, and the sheriff shall be thereby commanded to take the property, deliver it to the plaintiff and make return of the order on a day to be named therein."

By subsequent sections provision is made for the execution of the order of delivery and the judgment in the action as follows:

Section 5818: "The sheriff shall execute the order by taking the property therein mentioned; and he shall also deliver a copy of the order to the person charged with the unlawful detention of the property, or leave such copy at his usual place of residence."

Section 5819: "The sheriff shall, except as provided in the next section, deliver the property so taken to the plaintiff, his agent or attorney, where there is executed by sufficient surety by plaintiff, a written undertaking to defendant, in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages which may be awarded against him; and the undertaking shall be returned with the order."

Section 5824: "When judgment is rendered against the plaintiff or demurrer, or he fails to prosecute his action to final judgment, the court shall, on application of defendant, assess to defendant proper damages, including damages for the right of property or possession, or both if he prove himself entitled thereto, or cause the same to be done by a jury, for which, with costs of suit, the court shall render judgment for the defendant."

Section 5826: "When the property is delivered to the plaintiff, or remains in the hands of the sheriff, as provided in section 5820, if the jury, upon issue joined, find for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess to him such damages as they think right and proper, for which, with costs of suit, the court shall render judgment for defendant."

That, under these statutes, the bond given by the Plaintiff takes the place of the property itself, and that the property thus delivered to the plaintiff becomes his absolutely without regard to the subsequent decision of the replevin action, we cite the following:—

Jennings vs. Johnson, 17 Ohio, 154.
Smith vs. McGregor, 10 O. S., 461.
Lugenbeal vs. Lemert, 42 O. S., 1.

THE PENDENCY OF THE INJUNCTION PROCEEDINGS WAS NO BAR TO THE JURISDICTION OF THE FEDERAL COURT.

Equally without merit, is the contention that the Court below had no jurisdiction in this case to appoint a Receiver, because of the alleged pendency of another suit in injunction in the Court of Common Pleas of Ottawa County, Ohio.

It is charged that this cross action was brought by Tillotson for the purpose of eluding the jurisdiction in the State Court.

Judge Swan's opinion is quoted, where he says: "The responsible offenders were Tillotson and Richardson, who devised and procured the scheme apparently for the purpose of avoiding the effect of the action of replevin and of a suit in equity in the State Court," in the latter of which, as the Record shows, "Tillotson was still under injunction restraining him from interfering with the operation of the Railroad, to the control of which he asserted substantially the same rights as those pleaded in this Cross Bill here."

This language must be examined with reference to, and be limited by, the facts of the case.

The writ of injunction granted in this case enjoined The Industrial Mining & Guaranty Company, H. H. Warner, Carrothers and others, during the pendency of this suit, from selling, negotiating or otherwise disposing of the stocks and bonds of the said, The Put-in-Bay Water Works, Light & Railway

Company, now in their possession, or under their control, and received by virtue of the agreement made the 25th of June, 1892. (Record 15.)

The injunction proceedings in the State Court is thus described in the Answer of The Railroad Company. (Record 25.)

"On or about the 3rd day of September, 1892, the said Tillotson attempting to interfere with said Company in the operation of its said Railway, and to prevent the said Company from the peaceable enjoyment of its said property, the Common Pleas Court of Ottawa County, Ohio, on the petition of the said The Put-in-Bay Water Works, Light & Railway Company issued a restraining order enjoining the said defendant, J. K. Tillotson, from interefering, or attempting to interfere, in the operation of its said Railway, and which said restraining order is still in full force and effect."

The action of the Court thus referred to is more definitely stated in the affidavit of Carrothers in support of the motion to discharge the Receiver. (Record 37.)

"And thereupon, and to prevent the said Tillotson, his agents or servants, from such unlawful and forcible interference with the said Company's possession and operation of its property, the said Company obtained from the Common Pleas Court of Ottawa County, Ohio, a restraining order, a copy of which is hereto attached, marked Exhibit 'E.'" (Record 37-38.)

Exhibit "E", being a certified copy, is found on pages 38 and 39 of the Record, and we quote the injunction portion thereof:

"It is ordered and adjudged that the said defendants, and each of them be, and they are, hereby restrained and enjoined until the further order of this Court, from in any manner interfering with the said plaintiff's peaceable enjoyment of the possession and control of said The Put-in-Bay Water Works, Light & Railway Company, its property and business, and the said defendants, and each of them, are especially enjoined from shutting off the steam or stopping the pump so as to interfere with plaintiff's possession and operation of its property. It is

ordered that this decree *shall take effect upon Plaintiff giving an undertaking as provided by law*, in the sum of $5,000, to the satisfaction of the Clerk of this Court." (Record 38-39.)

Tillotson's injunction, therefore, restrained the Guaranty Company, Warner, Carrothers and others, from selling, negotiating, or otherwise disposing of the stocks and bonds of the Railway Company.

The Railway Company's attempted injunction was started to restrain Tillotson from interfering with the Company's possession.

We find it difficult, then, to see how Tillotson's injunction was a violation of section 720 of the United States Statutes.

Aside from the variance in the terms of the two injunction orders thus pointed out, it is to be particularly observed that it nowhere appears, either by the averments of the Answer, the statements of the Affidavit, or otherwise, that said injunction was ever served on, or otherwise brought to the notice of, Tillotson prior to his filing his Cross Bill, or that the same ever became operative as an injunction by the giving of the bond for $5,000, the giving of which *was imposed as a condition precedent to its effective operation*. The Certificate of the Clerk of the State Court is made ten days ater the date of the injunction order and fails to disclose that any such bond was given, or that summons was issued in the case, or that the injunction itself had been served upon Tillotson. As to the claim, therefore, that the appointment of the Receiver was a violation of the injunction and a contempt of the State Court, the failure to give bond is sufficient answer.

The statutes of Ohio at that time provided as follows:

Section 5576, R. S. of Ohio: "No injunction, unless otherwise provided by special statute shall operate until the party obtaining the same gives an undertaking executed by sufficient security, to be approved by the clerk of the court granting the injunction, in an amount to be fixed by the court or judge

allowing the same, to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted."

Section 5577 of the Revised Statutes of Ohio, provides:—

"The order of injunction shall be addressed to the party enjoined; shall state the injunction, and shall be issued by the clerk; when the injunction is allowed at the commencement of the action, the clerk shall endorse upon the summons 'Injunction allowed', and it shall not be necessary to issue the order of injunction."

The injunction in the State Court in this instance then being allowed on the condition of the giving of a bond, and the clerk's Certificate of the proceedings of the Court failing to show that the summons was issued and endorsed "Summons allowed," and no evidence in any form being disclosed to show either of these facts, or to show notice of the injunction by Tillotson, we contend that no injunction did issue, and are forced to the irresistible conclusion that the affidavit of Mr. Carrothers wherein he says "he obtained a restraining order," goes no further than to mean that he got a conditional order, but does not mean that the order ever became effectual by giving the bond and being served.

Furthermore, if we were to concede the existence of the injunction, as such, and its power to bind the conscience of Tillotson and to subject him to penalties at the hands of the State Court for contempt, we nevertheless submit that such fact would not affect the *jurisdiction* of the Federal Court. If the lower Court otherwise had jurisdiction, it would be in no manner taken away or diminished by the injunction of the State Court.

McKin vs. Voorheis, 7 Cranch., 279.

"To the rule permitting courts of one state in proper cases to enjoin persons within their jurisdiction from instituting legal proceedings in other states or from further proceedings in actions already begun, there exists the exception that state

courts cannot enjoin parties from proceeding in the Courts of of the United States nor the latter enjoin them from proceeding in the former courts; an exception based upon the peculiar grounds of municipal and constitutional law."

Story Eq.. sec. 900.

Story on Const., sec. 1757.

Moran vs. Sturges, 154 U. S., 256-268.

Peck vs. Jenness, 7 How., 612.

It is, however, apparently contended that the *pendency* of the replevin and injunction cases defeat the jurisdiction of the Federal Court. This claim will not bear investigation.

In the first place, the allegations and proof of such pendency are not made with sufficient clearness. As a defense the pendency of the prior action is not a favored one and the facts on which it is based should be made to appear clearly and with certainty.

Green vs. Underwood, 86 Fed., 427.

Hughes vs. Green, 84 Fed., 833.

Moffitt vs. Quine, 95 Fed.. 199.

Wetmore vs. Rymer, 169 U. S., 115.

Story Eq. Pl., sec. 736. et seq.

Passing over the method and extent of proof, however, and treating the affidavit as competent proof, such proof clearly shows that the Cross Bill of Tillotson in the suit at bar provided relief much more far-reaching than any possible to him as a defendant in the cases in the State Court. When such is the case a former suit is no bar to the second.

Watson vs. Jones, 13 Wall., 679.

Even if we concede his right to file a Cross Bill in either, or both, of said actions, praying for the relief prayed for in this suit, he was not bound to take such action but had the right also to bring his independent action in another tribunal having jurisdiction.

Washburn &c. Co. vs. Scutt, 22 Fed., 710.

Rapier vs. Paper Co., 64 Ala., 330.

Osborn vs. Cloud, 23 Ia., 104.

But the more insuperable objection to the claim that the former actions defeated the jurisdiction of the Federal Court in this suit lies in the relation existing between the State and Federal judiciary. That the State Court in the replevin case did not seize the property which is the subject matter of the present action, and that the matter in litigation and relief prayed for in that case were necessarily different than those of this action have been shown above. In like manner it is clear that the injunction case in no way amounted to a sequestration of the property involved in the Federal suit, nor did it in any other manner bring the *property* into the custody of the State Court. Therefore, treating the earlier cases as in effect purely *in personam*, and in no respect *in rem*, they clearly do not fall within the rule that forbids the Federal Courts to disturb the possession of the State Court.

It is conceded that where a Court has taken jurisdiction of a controversy relating to specific tangible property *and has taken that property into its possession, its jurisdiction over the whole controversy becomes exclusive.*

Peck vs. Jenness, 7 How., 612.
Taylor vs. Caryl, 20 How., 583.
Freeman vs. Howe, 24 How., 450.
Covell vs. Heyman, 111 U. S., 176.
Heidritter vs. Oil Cloth Co., 112 U. S., 294.
Coal Co., vs. McCreery, 141, U. S., 175.

But the basis of this rule is the possession as was said by Miller, Judge, in Buck vs. Colbath, 3 Wall., 334-342:

"This principle" (referring to the exclusive jurisdiction of the Court first acting) "has its limitations or, rather, its just definition is to be attended to. It is only while the property is in the possession of the Court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts."

So, too, in the absence of possession and in the exercise by a State Court of a jurisdiction *in personam*, no exclusive right in such Court is recognized.

Stanton vs. Embrey, 93 U. S., 548.
Latham vs. Chafee, 7 Fed., 520.
Watson vs. Jones, 13 Wall., 679.

"It is not true that a court having obtained jurisdiction of the subject matter of a suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same question exactly. On examining into the exclusive character of the jurisdiction of State Courts, we must have regard to the nature of the remedies, the character of the relief sought and the identity of the parties in the different suits."

Buck vs. Colbath, 3 Wall., 334.

"As between State and United States Courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree. But when the pendency of such a suit is set up to defeat another, the *case* must be the same. There must be the same parties, or at least such as represent the same interests; there must be the same rights asserted and the same relief prayed for. This relief must be founded on the the same facts and the title or essential basis of the relief must be the same."

The identity in these particulars should be such that if the pending case had already been disposed of it could be pleaded in bar as a former adjudication of the same matter between the same parties.

Per Miller, J., Watson vs. Jones, 13 Wall., 679-715.

Such identity as that mentioned above does not exist where, as in this instance, the *position of the parties as plaintiff and defendant in the State Court are reversed in the later case in the Federal Court.*

"In all cases to sustain a plea of the pendency of another action in abatement of a second suit two things must generally concur:—

"First, That the second suit should be by the same plaintiff, and against the same defendant.

"Second, That it should be for the same cause of action. 'All the authorities agree,' says Judge Story, 'that the plaintiff must be the same, for otherwise the cause of action cannot in a just and legal sense be the same.' Wadleigh vs. Veazie, 3 Sumner, 167."

Per Swan, J., Seymour vs. McDonald Lumber Co., 58 Fed., 957-961.

The case last above cited was decided by the Circuit Court of Appeals for the Sixth Circuit, about the time of its decision of the Appeal in the case at bar.

In the Seymour case Judge Swan's attention was more particularly called to the subject of the pendency of the prior action and his decision in that case is entitled to far more weight than are the loose and ill-considered statements found in his opinion in the Appeal case at bar.

That the quotation of Judge Swan from the opinion of Judge Story in the Wadleigh case accurately states the law applicable to the question under discussion, is clearly indicated by the authorities:

Wadsworth vs. Johnson, 41 Cal., 61.
Screw Co. vs. Blivin, 3 Blatch., 240.
Barr vs. Chapman, 5 Ohio Cir. Ct., 69.
Washburn, etc., Co., vs. Scutt, 22 Fed., 710.
Rapier vs. Paper Co., 64 Ala., 330.

None of the cases cited in Appellant's Brief, pages 35-36, conflict with the principles above stated.

Chetwood's case itself distinctly recognizes the existence of exceptions to the general rule, although its decision does not call for their statement.

The following cases are in point upon the question and are distinctly in favor of the jurisdiction of the Federal Court in this class of cases:

Merrett vs. American Barge Co., 79 Fed., 228.
Gordon vs. Gilfoil, 99 U. S., 168.
Green vs. Underwood, 86 Fed., 429.
Rogers vs. Pitt, 96 Fed., 677.
Ryan vs. Seaboard, &c., Co., 89 Fed., 407.
Breudal vs. Church, 82 Fed., 262.
Gamble vs. San Diego, 79 Fed., 500.
Shaw vs. Lyman, 79 Fed., 3.
Denney vs. Ins. Co., 78 Fed., 4.
Marks vs. Marks, 75 Fed., 332.
Short vs. Hepburn, 75 Fed., 113.
Muskegum vs. Clark, 62 Fed., 698.
Wilcox vs. Ins. Co., 61 Fed., 200.
Leggett vs. Glenn, 51 Fed., 389.
Sharon vs. Terry, 13 Saw., 392.
Pierce vs. Feagans, 39 Fed., 587.

Tested, therefore, by these principles it is clear that the cases pending in the State Court in replevin and in injunction, wherein Tillotson was defendant, were no bar to the jurisdiction of the Federal Court to entertain a Cross Bill, wherein Tillotson in effect became plaintiff, and wherein was sought a further relief touching real estate which could not have been included in the replevin suit, and which was not either actually or constructively brought into the State Court's possession by the injunction case.

ALTHOUGH THE CIRCUIT COURT WAS SUBSEQUENTLY ADVISED OF THE CLAIM THAT ITS JURISDICTION WAS INVOKED BY A COLLUSIVE MISSTATEMENT OF THE AMOUNT INVOLVED, NO DEFECT OF JURISDICTION APPEARED AT THE TIME THE RECEIVER WAS APPOINTED.

We have been particular in our discussion of the claim

made by Appellant in respect to the pendency of the replevin and injunction proceedings, because it is claimed with much confidence that the lack of jurisdiction of the United States Circuit Court was at all times apparent upon its record from and after the filing of the Answers thereto on September 26th, 1892. (See Brief of Appellant, p. 26.)

We take issue squarely with this claim of Counsel. The allegations of the Answers respecting the replevin and injunction proceedings we have already considered. From these we have seen that no claim can be made that in this respect the Answers disclose the lack of jurisdiction. It remains, therefore, to discuss the question whether a defective jurisdiction arising from lack of jurisdictional amount in the Complainant's real claim, or from collusion on its part with Tillotson, so appeared, either in these Answers or otherwise upon the record, as to advise the Court below that it was without jurisdiction, under Section 5 of the Act of March 3d, 1875, prior to the date of the first issue of Receiver's Certificates, October 15th, 1892, to October 28th, 1892. The Bill did not disclose any infirmity. It sought the foreclosure of a lien on which more than $2,000, exclusive of interest and costs, was due against a resident and citizen of Ohio in favor of a resident and citizen of Illinois, making, as defendants also, persons claiming an interest in the property, who in no instance were residents of Illinois.

On its face this Bill gave jurisdiction.

Farmers' Bank vs. Hoof, 7 Pet., 168.
Sewall vs. Chamberlin, 5 How., 6.
Hulsekamp vs. Teel, 2 Dall., 358.
Culver vs. Crawford, 16 Pet., 97.
Kanounse vs. Martin, 15 How., 198.
Vance vs. Vandercock, 170 U. S., 478.
Peeler vs. Lathrop, 48 Fed., 780.
Riggs vs. Clark, 71 Fed., 560.
Johnson, etc., Co. vs. Kutman, 54 Fed., 574.

The averments of the Cross Bill of Tillotson do not disclose any infirmity of jurisdiction, and the case thereby presented was so far germane to the subject matter of the Bill as clearly to be within the Court's jurisdiction to entertain, and on which the Court had power to grant the desired relief if ultimately warranted by the proof.

In this connection we quote the language of Judge Taft in rendering his opinion upon the appeal of this case. (To be found on page 68 of the Record).

"Nor can I agree that the cross-bill of Tillotson was not germane to the action as brought in the bill. The bill prayed for a foreclosure of the lien, a sale of the railway, and, as incident and necessary to such reliefs, a marshaling of all other liens upon the property and a distribution of the proceeds among the lien-holders and others interested. It was proper for each defendant to set up his right in the property or its proceeds. Tillotson claimed a mortgage lien on the property to secure certain bonds, his title to which had been disputed by another defendant. The complainant was entitled to have both claimants brought in so that the property might be sold free from the lien of the claim in dispute between them. Being in court, their rights to the proceeds of the sale to be decreed under the prayer of the complainant must necessarily be determined before a distribution would be made, and this would, of course, involve the settlement of the entire dispute as to the title between them. I am not prepared to say that Tillotson's Cross Bill did not, on its face, state a good case for equitable relief. It is not necessary now to decide the question."

The Bill and this Cross Bill of Tillotson's were the only pleadings on file at the time the Receiver was appointed. Under them it is claimed there was apparent jurisdiction. There was an appeal to a Court of competent jurisdiction, regarding an apparent controversy, shown to exist for an amount apparently sufficient, and between parties of requisite citizenship.

Nothing appeared that was not perfectly consistent with the existence of the jurisdiction conferred by the Bill. Such jurisdictional facts appearing by the Bill, and no evidence of collusion appearing on the Cross Bill, an objection to the jurisdiction at that time would necessarily have been overruled.

Ross vs. McGuffin, 2 Wills., Civ. Cas. Ct. App. (Texas) 458;
Parham vs. Hardin, 11 Iredell Law, 219.
Cummings vs. Edmondson, 5 Port., 148.

These cases arose under statutes very similar in effect and form with that of March 3d, 1875, and under this latter statute the same doctrine has been laid down by at least one Court, in the case of Moffitt vs. Quine, 95 Fed., 199, where the Court says:

"It is sufficient to sustain the jurisdiction of the Circuit Court, where the requisite jurisdictional facts are shown by the complaint, that it does not at any time thereafter satisfactorily appear to the Court that the suit does not really and substantially involve the jurisdictional amount."

In the face of this declaration, it seems a safe conclusion that until it is thus made to appear, the Court may presume and act upon the presumption of jurisdiction.

The Court below acted, in fact, upon such presumption, and on September 10th, 1892, appointed a Receiver. (Record 11.)

Counsel for Appellant say this appointment was made without notice and upon the averments of the Cross Bill only, the Bill, it is said, being merely a device whereby Tillotson secured such action.

This claim does the lower Court injustice. No such device appeared on the record and there was clear equity in *behalf of the complainant* to have a Receiver take possession of the property covered by his lien, when contending factions were wrangling over the right to an administration of that property, to complainant's manifest disadvantage and possible loss.

But it matters not now whether the averments of the pleadings warranted the appointment, or were true or false in fact, or whether the appointment was, or was not, made upon sufficient notice. These matters were debated in the Court below, upon a motion to discharge the Receiver, and are not reviewable in this proceeding. Here, we are concerned only with the question of the existence of the power to appoint, and not with the question whether or not, error intervened in the exercise of the power.

Between the date of the appointment of the Receiver, September 10th 1892, (Record 11) and the date of the order to issue certificates, October 15th, 1892, (Record 30) the only additional pleadings filed were the intervening petition of Arbuckle, Ryan & Company, filed September 3d, 1892, (Record 26) and the Answers of Carrothers and the Railway Company, to the Bill and to Tillotson's Cross Bill, filed September 26th, 1892. (Record 16-26).

It is not claimed, of course, that any defect of jurisdiction was disclosed by the pleading filed by Arbuckle, Ryan & Company. On the other hand, it is claimed (Brief p. 26) that from the time of the filing of the Answers there "was not a moment when the Court was not apprised of the fact that its jurisdiction had been imposed upon."

Let us examine the pleadings with a view of ascertaining whether this statement is correct.

The averments of these Answers, so far as the same relate to matters jurisdictional, consist of the following, and of the following only:—

1. A denial that the materials sold by complainant to the Railway Company were of the value alleged in the Bill, to-wit, $2,787.04. (Record 17).

2. A statement *on information and belief only* that such material amounted in value to about the amount of $700.00, and no more. (Record 17).

3. A statement that a large part of said material (but what amount is not stated) was furnished for use in Hotel Victory, to complainant's knowledge. (Record 17).

4. A statement that Tillotson procured the complainant to include both amounts in one lien, to perfect such lien, and to bring this action to foreclose the same. (Record 17).

5. A statement that the Railway Company had obtained possession of its railway by virtue of a writ of replevin (sic), but from whom is not stated (though inferentially from Tillotson), nor is the then pendency of the replevin suit alleged. (Record 20).

6. A statement that on September 3d, 1892, the Railway Company procured the Ottawa County Common Pleas Court to issue a restraining order, and the conditions of said order. (Record 25).

Merely to deny the amount of complainant's claim did not oust the Federal Court's jurisdiction, nor did the partial admission that complainant's claim was valid to the extent of $700.

Kinkle vs. Brown, 99 Fed., 593.

Rae vs. Railroad Company, 14 Fed., 402.

Lozano vs. Wehmer, 22 Fed., 755.

The other averments of the Answers above referred to do not amount to an averment of collusion. Although it is alleged that a large part of the claim sued upon was material furnished to Hotel Victory, it does not appear from any averments, but that enough remained, furnished to the Railway Company, to be within the Court's jurisdictional amount.

It is submitted that it was perfectly proper for Mr. Tillotson to suggest to the complainant to institute this action, even though said institution should indirectly be to the benefit of Mr. Tillotson, provided the jurisdiction over such action, in fact, existed. Nothing is more common in practice. Many States, recognizing the underlying equity to such proceedings, have provided statutory methods whereby parties can compel the

present institution of litigation, the delay of which may be prejudicial. No fraud would have been practiced upon the Court merely from the fact that Tillotson induced the Complainant to bring the present action, had that action been, in truth, for an amount within the Court's jurisdiction.

In like manner, had the complainant's action been, in truth, for an amount within the Court's jurisdiction, no fraud would have been practiced upon the Court, or its jurisdiction, by inducing the complainant to include Tillotson as one of the defendants.

Tillotson claimed an interest in the division of any proceeds of the Railway Company's property remaining after the satisfaction of its other and prior creditors. The subject matter of his Cross Bill presented for the Court's adjudication his rights in such controversy.

We refer again to the quotation above from the opinion of Judge Taft, and submit that this statement is an accurate representation of the actual facts of the controversy. The claim, therefore, that a lack of jurisdiction, because of collusion, appeared upon the face of the Bill, Cross Bill of Tillotson, Cross Bill of Arbuckle, Ryan & Company, or of any of the Answers in the case, completely fails.

It seems that Counsels' argument that jurisdiction failed upon the averments of the Answers is based upon a confusion that has resulted from the attempt to carry back into the record, as it stood immediately upon the filing of the Answers, facts which were not developed until the subsequent coming in of the Terry Affidavit.

It is true that it *subsequently developed* that Tillotson not only procured the complainant to bring the action and to make him (Tillotson) party (matters not wrongful in themselves, as above shown), but also procured the complainant to give a colorable jurisdiction by falsely over-stating the amount of its

claim; but we must distinguish carefully between the facts subsequently ascertained and the facts as they appeared at the time the Receiver was appointed, and at the time the Receiver's Certificates were authorized and negotiated. As a matter of fact, to no Court was it made to appear that there was any infirmity in the jurisdiction of the Court until a judicial determination of the facts resulting in such effect was had by the Circuit Court of Appeals in May, 1893.

Whether, however, the date at which the jurisdiction failed be fixed at May, 1893, or at the time of the hearing before Judge Ricks, December 22d, 1892, can make no difference. Even if it is to be related back, it can go no further back than November 12th, 1892, when Terry's Affidavit was filed, disclosing and putting upon record evidence which, when acted upon, justified the action of the Court.

It cannot fairly be claimed that jurisdiction failed the moment the Answer was filed, even though that Answer might put the Court on inquiry. The Judge is the Court, and the Court is put on inquiry when the Judge's judicial action is invoked. In this case appearance day for Defendant was the first Monday of October, 1892, and the Answer day the first Monday of November. How can it be said the Judge had notice of allegations of an Answer filed long before it was required to be filed by the rules of the Court, in the absence of some motion, directly calling the Judge's attention to the pleading?

THE RECEIVER'S CERTIFICATES OF OCTOBER 15TH, 1892, WERE VALID CHARGES.

Thus far we have seen that prior to the filing of the Terry Affidavit there was nothing in the record disclosing a want of jurisdiction; that the claim made that such jurisdiction was defeated by the pendency of the replevin action is unfounded; that the claim that such jurisdiction failed because of the injunction proceeding is based upon misapprehension and failure

of proof; that the charge of collusion, excepting in the one matter of overstatement of complainant's claim, is not made out; and that as to the matter of collusion in respect to the amount of complainant's claim, knowledge of the defect was not in the Court's possession prior to November 12th, 1892; and, finally, that at the date last named, the Receiver was in possession of all the property.

This appointment of the Receiver being made by a Court having apparent jurisdiction, possession taken by such Receiver was a possession under color of right, and whether or not, in truth, the property in question ought ever have come into the possession of such Receiver, it came, not as the result of a mere trespass, but to an officer dependent upon, subject to the orders of, and entitled to protection from, the Circuit Court of the United States.

Any questions, therefore, respecting the rightfulness of that possession or respecting the disposition to be made of the property thus possessed, were thenceforth to be determined by that Court, and by that Court exclusively.

Freeman vs. Howe, 24 How., 450.
Compton vs. Jessup, 15 C. C. A., 397.
Gumble vs. Pitkin, 124 U. S., 131.
Moran vs. Sturges, 154 U. S., 256.
Taylor vs. Caryl, 20 How., 583.

One question concerning that possession arose immediately. The Receiver found that the property was liable to waste and destruction unless properly housed and protected. Therefore on October 15th, 1892, nearly a month before the infirmity of the Court's jurisdiction became known, he applied to the Court for authority to borrow money to protect that property from impending loss.

It is clear, of course, that this was a proper ground for the ordinary exercise of the Court's discretion in issuing Receiver's Certificates.

Meyer vs. Johnston, 53 Ala., 237.
Wallace vs. Loomis, 97 U. S., 146.

Complaint is made that these Certificates were authorized without proper notice. If so, it was simply an irregularity not affecting the jurisdiction, and is not subject to review in this proceeding. It would seem, however, that the objection is not well taken. The defendant Railway Company had answered in the case and was represented by diligent and able Counsel. The first report of the Receiver shows that the negotiation of the Certificates did not take place until about the 28th of October, 1892, so that ample time seems to have remained for the defendant Company to obtain a rehearing by the Court of its order in the premises had such been desired.

It would seem a fair inference from the record that the Company acquiesced in the expenditure for the evidently necessary expense of protecting its own property.

Humphrey vs. Allen, 111 Ill., 490.
Beach on Receivers, sec. 399.

Be that, however, as it may, it is clear that these Certificates were issued for a legitimate purpose and were negotiated before any infirmity of jurisdiction appeared. Subsequent investigation by the Court (Record 76) developed the fact that they came into the hands of a party, without knowledge of any such infirmity, and who relied upon the condition of the record at the time of their negotiation.

Does then the statute of March 3d, 1875, have the retroactive effect of making void everything done prior to the discovery of the lack of jurisdiction, including the Certificates issued under these circumstances? This would be retroactive law with a vengeance. Here the agent of the Court takes possession of the property, borrows money to the extent of $5.000.00, takes care of the property, pays its debts, builds and repairs its buildings, under orders given at a time when there is no notice to any one, Receiver or purchaser, of any want of jurisdiction

which would cast even a cloud upon the title derived therefrom, and the Court is asked to turn back the property preserved from injury and destruction, greatly added to in value, without protecting its own officers for expense thus incurred by the express direction of the Court.

Is it possible that in a Court of Equity such construction of this Act is to be maintained? We have not only innocent purchasers, but purchasers who from an inspection of the record find nowhere that the Receiver is without permission to borrow this money which has been expressly made a lien on the property in his hands.

It is said that a trustee holding tortiously cannot ask compensation for improvements made by him upon the property. This is not a case of a trustee. It is the Court who ordered these improvements and which decreed that the property be expressly subjected to a lien for the money used in making them. To hold that under such circumstances a party who in good faith has purchased the Certificates, relying upon the apparent jurisdiction to issue them, should be deprived of his right to look to the specific property pledged to their payment, and in lieu thereof take, as suggested by Counsel for Appellant, the uncertain value of a personal judgment against Tillotson, would be the means of requiring the Circuit Court to commit a most glaring fraud upon its own creditors, and thereby utterly to nullify the well accepted doctrine that Courts, at least, must pay their debts, whether or not other persons do so.

III.

HAD THE COURT POWER TO IMPRESS THE PROPERTY WITH THE LIEN OF COSTS AND CERTIFICATES, OR EITHER?

We have now come, in chronological sequence, to the time when it appeared to its satisfaction that the Court was, in fact, without jurisdiction, because the amount involved did not

exceed $2,000.00, and we finally reach the discussion of principles that will answer affirmatively the above question.

The contention of complainant is, that upon the discovery of this lack of jurisdiction the Court was required, not only to proceed no further, but at once to dismiss the cause entirely. The refusal of the Court to do so is the gist of its complaint.

The statute of March 3d, 1875, does not in terms require such action. It provides that upon its being made to appear to the Court's satisfaction that the defect of jurisdiction from any of the causes mentioned exists, such Court "shall proceed no further therein, but shall dismiss the suit, or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

In Williams vs. Nottawa, 105 U. S., 209-211, it is said:

"This statute imposes the duty on the Court of its own account to stop all further proceedings and dismiss the suit, the moment a fraud is discovered."

In Farmington v. Pillsbury, 114 U. S., 138, it was stated that the old rule requiring the objection to citizenship, unless appearing on the face of the record to be pleaded, was changed by the Act of 1875, under which Act the Federal Court can dismiss for want of jurisdiction at any time.

In Hertog vs. Memory, 116 U. S., 588, it was held that where the citizenship of the parties was alleged in the declaration, and was such as, if truly stated, gave the Court jurisdiction, and the defendant purposely omitting to make known his citizenship, pleaded to the merits, the question of citizenship did not arise, and evidence by the defendant contradicting the allegations of the declaration as to his citizenship are irrelevant and afforded no basis for the dismissal of the suit.

In Vol. 29, L. Co-Op. Ed., p. 726, where the above case is reprinted, it is laid down, that while the requirement which formerly existed, that a plea of abatement was the only method by which question of jurisdiction could be raised, and that a

plea to the merits was a waiver of plea to the jurisdiction, was not in force, yet that in its general scope this rule has not been altered by the Act of 1875.

The Court then states that owing to the old rule, Courts were prevented from taking notice of colorable assignments or transfers to create cases for the general jurisdiction of the United States Courts in the absence of the plea of abatement; hence, "We held in Williams vs. Nottawa, 105 U. S., 209-211, that the statute changed the rule so as to *allow* the Court at any time, without plea, and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered."

The Court further says:—

"Neither party has the right without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make a case for dismissal. The parties cannot go behind the averments of citizenship in the record except by a plea to the jurisdiction, or some other proper method. The evidence must be directed to the issues, and it is only when facts material to the issue show there is no jurisdiction that the court can dismiss the case upon motion of either party."

"If in the course of a trial it appears by evidence which is admissible under the pleadings and pertinent to the issues involved, that the suit does not really and substantially involve a suit which the Court has cognizance, or if the parties have been improperly or collusively joined for the purpose of making a cognizable case, the Court *may* stop all further proceedings and dismiss the case."

In Barry vs. Edmonds, 116 U. S., 550, it was held that the Circuit Court *cannot* dismiss a cause on the ground that it does not involve a dispute or controversy within its jurisdiction, unless the facts when made distinctly to appear on the record, create a *legal certainty* of the conclusion based on them.

Again, it is said, in the same case: "Upon a personal conviction, however strong, a court would not be at liberty to act, unless the facts upon which the persuasion is based, when made to distinctly appear on the record, create a legal certainty of the conclusions based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account shall appear to the 'satisfaction of the Circuit Court.'"

The same doctrine is held in Duputron vs. Young, 134 U. S., 241.

The cases of Morris vs. Gilmer, 129 U. S., 315,
Ry. Co. vs. Swan, 111 U. S., 379,
Blacklock vs. Small, 127 U. S., 96,
Williams vs. Nottawa, 105 U. S., 209,

And the other cases, relied upon by Counsel for Appellant, all contain strong expressions relative to the duty of the Court, under the circumstances presented by each of those cases, at once to dismiss the action; but it is to be observed that *in not one of those cases were the rights of any third party involved,* and no injustice accrued by a dismissal; all the loss and expense caused thereby falling upon the guilty party.

In the case at bar it is to be noted that from the time the mandate of the Court of Appeals came down to the Circuit Court, the latter Court, in effect, dismissed the actions made by the Bill and Tillotson's Cross Bill, and proceeded no further upon either of these pleadings; no orders were taken, no decree rendered, nothing was done in favor of them, or either of them, whatsoever. The property in the Court's hands was, however, at this time encumbered by Receiver's Certificates to the amount of nearly $8,000; of which the original issue of $5,000, of October 15th, 1892, were clearly issued under circumstances such that their repudiation would be a gross injustice to their holder.

The statute may be treated as mandatory, as regards further proceedings in the case, but it is not in terms mandatory as to the dismissal, but qualifies such action by giving to the Court a discretion in the exercise of this duty to shape its order in such manner as justice may require. This right to exercise an equitable power in shaping its dismissal order, was distinctly recognized by the opinion of the Court of Appeals upon the appeal of this case.

This opinion was followed by a mandate directing the lower Court to take such further proceedings in the case as *should accord with such opinion, (Record 54)* and the Court below, therefore, as has been above suggested, very properly considered itself bound by such opinion, and treated the case as one properly calling for the exercise of its discretion in this regard.

Mining Co. v. Billings, 150 U. S., 31.

The order of June 12th, 1894, (Record 74) made after the coming in of the report of Special Master Belford, (Record 71-73) was in direct accord with this mandate, and the equitable principle thereby recognized. The investigation made before the Master was made in compliance with the views of the Circuit Court of Appeals. (Record 70). Special attention in this connection should be given to the fact that this order of June 12th, 1894, was made with the full concurrence of the Railway Company, acting through its distinguished Counsel, Senator Foraker, and by the very terms of that order, the injunction bond of Tillotson was ordered to be taken from the files.

It was in accordance with the "requirements of justice" when the Railway Company asked the Court to restore the property to them, with the statement that it "was ready and willing, and then tendered a bond for the payment of all charges incurred in such Receivership that may be finally determined a first and prior lien upon the property of the Railway Company," for the Court to grant the prayer for the resto-

ration of said property, conditioned upon the giving of the bond for the payment of such charges incurred by the Receiver, including Certificates issued by him, as should be finally determined a lien on the property, and to direct that the Company should, in giving the bond, submit itself to the jurisdiction of the Court for that purpose, so that the bond when entered into should be effectual and its collection not resisted on the ground of want of jurisdiction.

It is not clear why the Appellant, having at one time expressed its willingness to give bond for the payment of these claims, if adjudged valid, should object to that part of the Court's order requiring it to submit to the jurisdiction of the Court, to the end that said bond should be enforced. Was the Appellant seeking to perpetrate a fraud upon the Court? If any of the charges as ultimately determined were not right, the remedy by appeal to a higher Court was easy. The Railway Company could at any time have had the property and enjoyed its possession for many years simply by giving a bond to pay the just and proper charges. What charges were just and proper after their determination were again open to review, not only by the Circuit Court, but by the proper Appellate Court.

Instead, however, of giving a bond, and forgetting, apparently, that the appointment of the Receiver, and the issuing of the Receiver's Certificates, were by a de jure court with a de facto jurisdiction, the Appellant now seeks to evade the payment of all charges, not as improper expenditures of money, but as expenditures void ab initio.

If the Supreme Court of the United States promulgates the doctrine that no matter how unquestioned is the jurisdiction at the time of the appointment of a R eiver, and of the incurring of charges made by him under order of the Court for the betterment of the property, yet if subsequent thereto

it is discovered that there was not the amount of $2,000 in controversy, and because of such ex post facto finding, all acts of the Court and the Receiver and the latter's charges for the care of the property are to be swept aside, it will be regarded as a most startling and inequitable conclusion of law by the highest Court of Equity in the world.

We are not entirely without the guidance of authority in arriving at this conclusion. Under circumstances in many respects parallel the Court has exercised a power to adjudicate concerning funds in the possession of a Receiver, although it had been determined that the Court was without jurisdiction over the case in which he was appointed by reason of collusion of parties. We refer to the case of Sage vs. The Memphis & Little Rock Railway Company, 125 U. S., 361. In this case it had been determined by the Circuit Court that its jurisdiction to take possession of the railroad property had not been used in good faith for the purpose of collecting a judgment alleged to have been rendered in favor of the complainant, but rather for the purpose of placing the property and business of the Railroad Company in the hands of the Court to be managed through a Receiver, to the end that such Company might not be subject to suits by its various creditors. This procedure was determined to be collusive, and the jurisdiction of the Court was held not to attach, and the Receiver directed to deliver back to the Railroad Company the property. Prior, however, to the ascertainment of these facts, large sums of money had come into the Receiver's hands from the operation of the road. It does not appear in the case that certificates had been issued. Therefore, unfortunately, the exact question here presented did not arise for determination in that case. But the Court did proceed to dispose of the net earnings of the property, while under the management of its officers, and this assumption of jurisdiction and power of the lower Court to

deal with this fund, as well as the actual orders made relative thereto, were approved and affirmed by the Supreme Court."

As we have just said, this case is not distinctly in point upon the exact question made upon this appeal; but it is submitted that the decision arrived at in that case could not have been made but upon the theory of the existence of a jurisdiction, even in collusive cases, to dispose of property in the Court's hands in a manner that shall be equitable.

The power to do this is all that is in question in this suit.

It is beyond contradiction that the Court below had discretion upon the dismissal as regards costs. The statute so provides specifically. In the very nature of the case the trial court is in better position to decide upon a proper order in this respect, and has much better opportunity for knowledge as to what justice requires in awarding them than any Appellate Court can have, and it is, undoubtedly, for this reason that the statute gives to that Court the power in question.

It is alleged in Appellant's argument that no precedent is to be found where all the costs had been taxed as they were in this case. There seem to be two answers to this contention; first, that the matter is discretionary under the statute; second, that the order was, in fact, made in the exercise of an undoubted jurisdiction, and hence, if erroneous, is not subject to review in this proceeding.

Moreover, a receivership is in the nature of an equitable attachment or execution. Money expended in taking care of property seized on attachment or execution by Marshal or Sheriff is always taxed as part of the costs, and in this view the expenses and charges of a receivership may well be treated as part of the costs in the case and be covered by the spirit, at least, if not the language of the statute under discussion.

We conclude, therefore, that under the terms of the statute itself the decree for the sale made in this case cannot be treated as one made without jurisdiction:—

1. Because under the terms of the statute there was jurisdiction to decree as to the costs, and

2. Because under the statute there was an equitable power reserved to the Court which was exercised in protecting the holder of the Receiver's Certificates.

But, independently of the statute, the jurisdiction to enter the decree rendered in this case may be sustained under a proper application of the rule laid down in Mail Company vs. Flanders, 12 Wall., 130.

This doctrine, in brief, is that there exists an inherent power in every Court to undo, so far as possible, the mischief caused by any order made by it before it becomes aware of a lack of jurisdiction. The doctrine of this case has never been questioned in this Court and its exceedingly equitable doctrine has been followed in other jurisdictions.

Thus in Booth vs. Ableman, 18 Wis., 495, where the State Sheriff had taken property from the United States Marshal by replevin (that is, under circumstances substantially identical with those in Freeman vs. Howe), while the State Court did not hesitate to declare itself without jurisdiction to try the main issues of the case, it nevertheless reversed the lower Court for *failing* to exercise a jurisdiction to make restitution of the property.

So in Close vs. Haming, 17 S. W., 850, (Texas), Haming sued out a writ of sequestration and obtained possession of the property. Upon subsequent discovery that the value of the property was beyond the Court's jurisdiction, the trial Court dismissed the case and refused the demand of Close, that the property taken by Haming should be restored to him. On appeal this judgment was reformed by ordering restitution.

These cases, although at first blush they seem favorable to the main contention of the other side, are cited to demonstrate the fact that a Court, even when it fails to have jurisdiction over a controversy brought before it, nevertheless, has a jurisdiction to decide upon and make an order concerning the possession of property taken by it before the discovery of its lack of jurisdiction.

It is contended that in this case the order of the Court should have been one of restoration to the defendant Railway Company (as in the Booth, Washburn and Close cases), and that the Court below should have so ordered. Whether the order entered in the Court below was the proper order, or not, or an equitable order, or not, is not material upon this appeal.

It is not sought here to reverse that order as erroneous. The jurisdiction to make the order is attacked. If that jurisdiction existed, as shown by the holding in the above cases, then the Court has power to hear and determine upon the question of restoration.

Nor do we understand that the Appellant seriously questioned in the Court below the existence of that jurisdiction to hear and determine as to restoration. In fact, it appealed to that jurisdiction by its repeated motions for such restoration.

If the contention now made by Appellant's Counsel is correct, the power of the Court below was limited to the power to dismiss the case. An order, however, for mere dismissal did not seem any more satisfactory to Appellant when in the Court below than to the Appellees. In that Court it desired the further order directing the Receiver to surrender to the Appellant the property in his possession. The contention of the Appellees, on the other hand, in the Court below, as in this Court, was at all times that there existed in that Court the jurisdiction and power to order concerning restitution. While they contended that such restitution should not be made except

upon certain equitable principles, yet they there, as here, insisted that the ascertainment of the facts on which these equitable principles rested, or indeed, the ascertainment of their non-existence, involved the power as well as the duty to make inquiry into the facts of the case, and that whenever the power to inquire into facts exists as precedent to the entry of an order or decree, jurisdiction necessarily exists, since jurisdiction is the power to hear and determine.

Sheldon vs. Newton, 3 O. S., 494.
U. S. vs. Arredondo, 6-Peters, 691.

As has been said above, in the Court below the Appellant here submitted itself to that jurisdiction—a submission that would have been entirely satisfactory, undoubtedly, had it resulted in a judgment in its own favor. But in a suit between A and B a jurisdiction to decide in favor of A and against B. likewise confers power to enter a judgment in favor of B and against A. To make the latter decision may be erroneous, but the decision when made is made in the exercise of jurisdiction and is not void.

The Court which has the power to hold a hearing and determine thereupon cannot deprive itself of jurisdiction by the entry of an erroneous decision. It seems, therefore, to Counsel for Appellees that the Appellant has mistaken its tribunal upon appeal and that its complaint is in reality a complaint concerning the erroneous exercise of jurisdiction that clearly existed, rather than concerning the non-existence of that jurisdiction; in other words, that the Appellant should have sought to reverse the decree of the lower Court by an appeal to the Circuit Court of Appeals of the Sixth Circuit, rather than by appeal to this Court, which can consider the question of jurisdiction only. The Circuit Court of Appeals had ample power to adjudge all questions raised here as well as these additional ones that Counsel seek to raise.

U. S. vs. Jahn, 155 U. S., 109.
Robinson vs. Caldwell, 105 U. S., 359.
1 Desty Fed. Prod., p. 646.

It is not to be understood by the above that it is conceded that the order actually entered by the Court below was inequitable. On the other hand, it was clearly equitable under the facts of the case. Throughout the argument by Counsel for Appellant the assumption has been uniformly made that the Receiver was in possession of certain property belonging to the Railroad Company, and that upon motion to dismiss, that property should have been returned to the Appellant. But there was another party equally at least entitled to protection —the holder of the Receiver's Certificates.

Looking at the essence of things, it is clear that what the Receiver originally took possession of was a certain railway property and a power plant, heavily encumbered. Of what these encumbrances consisted, at least in part, was determined by a subsequent reference in the case. While the report of the Master is not spread at large in the printed record in this case, his conclusions sufficiently appear in the motion filed by the Railroad Company, a copy of which appears in the printed record at pages 96 to 100.

We find, therefore, that the Railway, when taken possession of by the Receiver, was encumbered by labor liens (Record 98) to the amount of nearly $900.00; that a tax lien was subsequently adjudged, amounting to $1,400 at one time and nearly $600 at another. (See order of distribution).

In addition, shortly after the Receiver took possession, and before any motion for dismissal was filed, the property was equitably charged with the costs of certain necessary improvements and expenses of preservation amounting to nearly $3,000.00 more, and also with a proper charge for the expense incident to the Receiver's care and custody.

Properly, to protect all parties, it was eminently equitable to give back to the Company the property thus improved and cleared of liens only upon the condition that the expenses thereof should be paid.

Mail Co. vs. Flanders holds that restitution shall be made *so far as practicable*, and so far as practicable that is exactly what the Court stood ready to do and at no time refused to do.

IV.

DID THE FACT OF THE COURT'S POSSESSION CONFER THE JURISDICTION EXERCISED IN THE CASE?

Thus far we have concerned ourselves with the question of the power of the Court to protect the holder of the Certificates and its power to make an order as to costs.

We enter now upon another branch of the discussion: what duty, if any, did the situation cast upon the Court in behalf of the intervening lien claimants?

The claims of Arbuckle, Ryan & Company, Barbour & Starr, and the other intervenors present very interesting questions. Arbuckle, Ryan & Company, to be sure, were originally named as defendants to the Bill, but they were not served until after the property came into the hands of the Receiver and their position in the case is essentially that of intervenors. Barbour & Starr were not named originally as parties, but at all times have been there as intervenors, coming in upon leave of Court. (Record 49). The Bodifield Belting Company and Atlantic Trust Company occupy the same position.

All this property being in the hands of the Court's Receiver *colore officii*, the holders of the mechanics' liens were thereby prevented from asserting their rights and claims against the property, before any other Court. The Federal Court, therefore, had not only the right to hear, but it was its duty to hear them and adjudicate upon their claims, even

though the order under which such possession had been taken was erroneous, irregular or even absolutely void.

Gumbel vs. Pitkins, 124 U. S., 131.

In the case last cited, various creditors obtained attachments on Sunday from the United State Circuit Court. These attachments were levied on Sunday and the issue and levy thereof was in violation of statute. On the day following, while the Marshal was in possession under these attachments, Gumbel obtained a writ of attachment from the State Court, under which the Sheriff came to the place where the property was situate for the purpose of serving his writ, and attempted entrance; which the Marshal refused. The Marshal preserved his possession without interruption from the moment of seizure down to the time he sold the property, under writs of attachment issued from the United States Court subsequent in time to Gumbel's attachment,—the Sunday writs being abandoned.

The question arose as to the right of Gumbel, under his attachment from the State Court. The lower Court adjudged against the intervenor and dismissed his petition of intervention, holding that the Sheriff made no seizure and took no possession of the property, and further holding that the property must be distributed according to the priority of the writs that were issued from the United States Court upon Monday. The Supreme Court fully concurred with the view taken by the lower Court, that the possession of the Marshal under the Sunday writs was void, and that he was a trespasser in taking and maintaining possession, but distinctly held that the equitable powers of the Courts of the United States over their own process to prevent abuse and injustice are inherent and as specific as the necessity for their exercise requires; and that the Court which had wrongfully taken possession was entitled to administer equity in the case and grant to the intervenor suitable and proper relief.

The Court says at page 156: "When the Sheriff of the District Court undertook to levy on the goods in question and served the Marshal with notice as garnishee holding actual possession of the property, the latter was in fact, as we have already seen, in possession illegally under a writ which protected his official position only so far as to prevent the property from being forcibly withdrawn from the jurisdiction of the Circuit Court by judicial process, that Court *having acquired jurisdiction*, by virtue of the seizure under color of its authority, to decide all questions concerning it. That writ, though illegally issued and levied, was not void on its face. In a certain sense, therefore, the property was *in custodia legis*, and not subject to a levy under process which would have the effect of taking it out of his possession and control."

The case, therefore, stands thus: "for the reasons growing out of the peculiar relations between Federal and State Courts exercising co-ordinate jurisdiction over the same territory, the Circuit Court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority *although by illegal means and to decide all questions of conflicting right thereto.*"

While great stress may be laid upon this case, it does not stand alone. It is the logical and necessary corallary to be drawn from the case of Freeman vs. Howe, 24 How., 450, and is amply supported by the case of Compton vs. Jessup, 68 Fed., 263, and has been abundantly recognized since its promulgation as an accurate statement of the principles that must necessarily guide United States Courts in their relation to the State Courts.

In Compton vs. Jessup, 15 C. C. A. R., 397, 68 Fed., 263, the Court, Judge Taft, speaking for the Court, says:

"Necessity and comity both require that where by its officers acting under color of its orders or process, a Court has taken into its custom property of any kind, another Court, though of equal and co-ordinate jurisdiction, should not be per-

mitted either to oust the possession of the first court or in any way interfere with the complete control and disposition of the property for the purpose of the cause in which its action has been invoked."

Again:

"Every Court has *inherent equitable power to prevent its own process from working injustice to any one* and may entertain a petition by aggrieved persons, either in form of simple motion or by intervention *pro interesse suo* in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require."

It has been held also in other cases in the Federal Courts that where the United States Court has actual possession of property in which third parties claim an interest, the latter are by the fact of possession itself prevented from pursuing their ordinary remedy against the property in the State Courts, and, therefore, have the right to appeal to the Federal Court and save their rights and protect their interests regardless of adverse citizenship, or other disqualifying conditions.

Conwell vs. Canal Co., 4 Biss., 195.
Minn. Co. vs. St. Paul Co., 2 Wall., 609.
Krippendorf vs. Hyde, 110 U. S., 276.
Pacific Ry. Co. vs. Mo. Pa. Ry. Co., 3 Fed., 772.
Central Trust Co. vs. Bridges, 57 Fed., 753.
Taylor vs. Caryl, 20 How., 583.
Farmers L. & T. Co. vs. San Diego Co., 49 Fed., 188.
Heidritter vs. Oil Cloth Co., 112 U. S., 294.
Morgan, &c., Co. vs. Texas Central Ry. Co., 137 U. S., 171.

In many of these cases the holding of the Court goes much further than is required to sustain the jurisdiction of the lower Court in the case at bar.

In this case the possession of the Receiver was not that of a trespasser, and it is indisputable that some, at least, of the questions as to the disposition of the property could not be

worked out in any other Court than in that of which he was the arm. For instance, the claim for taxes upon the intervention of the Treasurer of Ottawa County was clearly of this nature.

Re Tyler, 149 U. S., 164.

That the same rule must apply to the mechanics' liens seems apparent.

Prior to the time when it became necessary, or even proper, for the lower Court to decide what relief, if any, it would grant, or should grant to the various intervenors, the Court had come to the decision, rightly or wrongly, that it could not and would not surrender its possession excepting upon certain conditions, which had not been complied with. If for the purpose of this branch of the argument it should be assumed and conceded that up to the time of its decision and in making this decision, all that the Court had done had been without jurisdiction, none the less, the fact remained that certain tangible real property was in the actual custody and control of a *de facto* Receiver, appointed by a Court which unquestionably had general power to appoint such an officer.

Here then we are solidly upon the ground and basis of the decision in Gumbel vs. Pitkin.

The further fact is apparent that during the six or seven years that elapsed from the first taking of possession the condition of the intervening petitioners was changed.

The intervening Treasurer of Ottawa County had the undoubted right to receive the taxes. To the extent of $1,400.00 it seems that these were paid from the net earnings of the road, but to the extent of nearly $600.00 the Treasurer was clearly without relief except through a sale or by the further operation of the road. It is not seriously contended, it is supposed, that the Court should have remained indefinitely in possession running this road until creditors were paid.

As to the intervening petitioners, Arbuckle, Ryan & Company, Barbour & Starr and The Bodifield Belting Company, had they not been permitted to intervene in this case, or assert their rights, those rights were forever lost. They claimed liens under the statutes of Ohio then in force. Such lien, under those statutes, is not perpetual but is subject to the limitation of the Revised Statutes of Ohio, section 3185, which provides that such lien "shall operate as a lien from the date of the first item of the labor performed or the machinery or material furnished upon, or toward, the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof."

It is clear, therefore, that to have refused to protect the lienors in the final decree would have been to turn them out without any remedy whatsoever in any Court, as their liens were lost by expiration of time. This certainly would hardly be in accord with the expression of the Court in Krippendorf vs. Hyde, 110 U. S., 276, where the Court very justly says, (at page 281) upon this topic:

"If we * * * * take from owners, wrongfully deprived of possession, the ordinary means of redress by suits for restitution in State Courts wherein one may sue without regard to citizenship, it is but *common justice* to furnish them with an equal and adequate remedy in the court itself, which maintains control of the property."

It is stated in the Brief for Appellant that the rights of the lienholders could have been saved by a prompt dismissal of the case and surrender of possession.

This may be conceded, if no duty was owing to the holder of the Receiver's Certificates. It was with this view, that Ar-

buckle, Ryan & Company raised the question that these Certificates were in fact paid by the terms of a contract between their holder and Carrothers, and prayed their surrender and the dismissal of the case. (Record 75.)

Rightly or wrongly the Court below overruled this motion and adjudged the Certificates not to be paid, (Record 76), and thereupon refused the prompt dismissal. Later the Statute of Limitations ran against the lienors' claims.

How, then, can the Federal Court give that equal and adequate remedy required by Krippendorf vs. Hyde otherwise than by exercising the special and limited jurisdiction maintained by Judge Severens in his opinion of January 31st, 1898? (Record 93).

No question can be made as to the power of the State Court to have ordered sale within the time limited by the statute for the payment of the liens of these intervenors. The only remedy, therefore, to be granted by the Circuit Court of the United States that will be adequate would require a similar order. To refuse, therefore, to order such a sale would have caused the lower Court very seriously to trench upon former decisions of the Supreme Court in these three cases of Krippendorf vs. Hyde, Re Tyler, and Gumbel vs. Pitkin, and it is suggested that this Court itself must affirm the decision of the lower Court or reverse its former rulings in the above cases.

The order of the Court decreeing sale may be further sustained upon the intervention of Atlantic Trust Company, the Trustee of the Mortgage Bonds. Its right to intervene is clear. The property was within the hands of the Court, sale was about to be made thereof, and the Company was interested in the proceeds of such sale; and in this instance, necessary diversity of citizenship existed between the Trust Company and the owner of the property and the parties asserting the liens.

The attempt made in Appellant's Brief to discredit the position of the Trust Company and its attorneys is hardly worthy of notice here.

The Trust Company had previously filed an independent Bill in the same Court to foreclose its said mortgage, but upon its becoming clear that sale was to be made in this case it came in as an intervenor and set up its mortgage. An attempt was made by Carrothers through one Simon Baruch to discredit its claim by charging that the Counsel who appeared for it had no right to represent the Company.

This Court, of course, cannot go behind the Record of the lower Court, where it was very properly held that the Court would assume that the Trust Company was represented by Counsel authorized to enter its appearance. (Record 117.)

We cannot, however, overlook the assumption of Counsel in their Brief that the fund finally distributed derived from the sale of the property, did not in any way benefit the Atlantic Trust Company. The holders of these Bonds are today claiming their share of the proceeds now left in the registry of the Court. The amount is, approximately, $2,600.

The property sold for $16,501. The order establishing the liens found that the costs and the Receiver's Certificates were a first lien on all the property. The mechanics' liens of Arbuckle, Ryan & Company, Barbour & Starr and The Bodified Belting Company were established as next in priority, but the lien thereof was confined to the power house and the lots and the lands on which the same stood, to the exclusion of the Railway property, on which latter the mortgage of the Trust Company is a lien next in priority after the costs and Receiver's Certificates. Hence, in the order of distribution, after providing for the payment of costs and Receiver's Certificates the remainder is ordered to be divided; namely, 100-165th to pay mechanics' liens and 65-165ths for the payment of the At-

lantic Trust Company's mortgage. The above proportions upon which this division was made were arrived at from the fact that the value of the power house was fixed by appraisal, made through a Master, at $10,000, and the balance of the Railroad property at $6,500.

The distribution thus made, after taking out costs and Receiver's Certificates leaves in the Registry of the Court applicable to the Atlantic Trust Company's mortgage the sum of $2,576.45. It is made manifest, therefore, that the Trustee for the bond-holders who represented whatever bonds were, in fact, issued and sold for the benefit of the property, as well as the material men who furnished the material to build the power house, who built the engines, boilers and dynamos, all came into this action as intervenors and asked for the foreclosure of their liens, because they were prevented from asserting their liens elsewhere by reason of the possession which the Court maintained of the property. They acquiesced in the just action of the Court in placing ahead of their liens the moneys expended for the betterment and improvement of the property. The right and necessity of these several claims which otherwise they could not enforce was finally recognized by the Court, after much hesitation, and their liens declared and determined. The Court was slow in arriving at this conclusion, because it had repeatedly declared to the owners of the Road "Pay such portion of the Receiver's Certificates now outstanding as represent actual unquestionable expenditure for the preservation and making better of your property and it will be returned to you."

But the Railroad Company (a young man by the name of Carrothers in fact) would not or could not do that, whereupon the Court finally consented to take the lieners' claims into consideration.

The Court will remember that the intervenors were anxious at all times to get out of the dilemma in which they were placed. They tried to have the Court adjudge the Receiver's Certificates paid and to order the Receiver discharged. They attempted to have a hearing in the regular way before a Master on the issues concerning collusion and amount of Complainant's claim. They pressed upon the Court only as a last resort an adjudication of their liens, and not until the same were about to expire by limitation. A failure to have heard their request would have produced most inequitable results.

The entire record makes it clear that the Railway projected by the Appellant Company was built upon credit. Money (a little) raised on bonds, and credit procured of the parties now asserting intervening liens, built and equipped the property. Apparently, not a dollar of the Company's money went into the scheme. Money borrowed upon Receiver's Certificates paid labor liens and tax liens against the property and completed and protected it.

Now the proposition is seriously advanced that a Court of Equity will order the surrender of this property to a nominal owner, for whom the same has been built, equipped, and preserved, and moreover, freed of all possible liens except that of such few of the bonds as may have been negotiated before this action was brought. Unless constrained to such course by the most stringent rules of statutory construction, such Court will not regard the appeal with favor.

To a certain extent Counsel for Appellant seem to recognize the difficulty here suggested and have shown great ingenuity in their discussion (pages 49-50 of their Brief) in suggesting some order that the Court below might have made, and that this Court should perhaps direct to be made to obviate the apparent iniquity of their main demands. Nothing is to be gained by discussion of the various claims made in the Brief

as to conspiracy, collusion and general bad faith of each and every person in this suit, except the innocent Railway Company. In so far, however, as the suggestion made in the Brief touches the question of ordering the Receiver's expenses to be cast upon the Receiver himself, while this Brief is in no sense filed in behalf of the Receiver, yet inasmuch as the jurisdiction we contend for is based, in part, upon the order of the Court in charging these expenses against the property itself, we call attention to certain well settled doctrines. Ordinarily the Receiver is not called upon by a Court to take his chances, either of the litigation itself, or the solvency of either of the parties thereto, but is entitled to protection by an order upon the fund itself. This doctrine is in strict analogy to the common law doctrine that gives every artificer a lien upon the property in his possession to reimburse himself for labor and care expended thereon.

The equitable lien thus created in behalf of the Receiver, unlike the common law lien referred to, is not confined to lien of possession only, but like all equitable liens is so molded by the Court as to protect the officer, effectually, even to the extent, if necessary, of a sale of the property in his charge.

If, in thus protecting its own officer, the Court thereby diminishes the fund rightly belonging to the party successful in the litigation, such party may be reimbursed, if the Court sees fit, by a judgment over against the other party in the suit.

Cutter vs. Pollock, 4 N. Dak., 216.
Heiser vs. Starr, 44 Ill., App., 406.
Hoffersack vs. Hoffersack, 61 How., Pr., 498.
Beckwith vs. Carroll, 56 Ala., 12.
Cattle Co. vs. Bindle, 32 S. W. (Tex.) 582.
Radfield vs. Fulson, 7 N. W. (Ia.) 604.

Such judgment being in the nature of a judgment for costs, is of course, largely within the discretion of the Court, and its failure to render the same cannot defeat the jurisdiction that

the Court had over the property, or that the Court had to make orders concerning the disposition of the property.

Therefore, in opposition to the claim of Appellant, which has been characterized as inequitable, the following claims are submitted as applicable, and decisive of this appeal:

1. The jurisdiction to adjudge the validity, amounts, and priorities of the liens of the several intervenors existed, if the jurisdiction to sell existed; since the power to sell involves the power to decide all questions the decision of which is necessary to give the purchaser a good title.

2. The jurisdiction to sell existed if the enforcement of any of the claims for which sale was made was within the equitable jurisdiction of the lower Court.

3. Such Court had jurisdiction to enforce:—(1) The payment of costs under the Statute of March 3, 1875; (2) The payment of all Receiver's expenses, under said Statute; (3) The payment of all Receiver's Certificates, under the inherent equitable powers of the Court to prevent wrong from the operation of its orders made before discovery of its general lack of jurisdiction; and this, independently of said Statute; and, (4) The payment of all taxes, mechanics' liens, and the Trust Company's mortgage, independently of said Statute or of the inherent equitable powers last mentioned, from the fact of the Court's possession of the property against which the same were asserted, whether such possession was, or was not, originally rightful.

4. The Circuit Court of Appeals, to which the Railroad Company appealed to settle the law of the case, recognized the duty and jurisdiction of the Circuit Court to provide for all proper expenses incurred by the Receiver for the benefit of all concerned in the protection and preservation of the property, and by its mandate enjoined the execution of that duty.

Therefore, the action of the Circuit Court in carrying out that order is not subject to a second appeal.

5. It would be grossly inequitable and unjust to reverse the decrees below and to vacate the sale made to purchasers who relied on the judgment of the Court and the opinions, if not judgment, of the Judges of the Circuit Court of Appeals, as well as the decision of Judges Ricks and Severens sitting as Circuit Judges, that the costs and Receiver's Certificates were established as a final lien on the property.

This case was in the Court below, as the Record shows, for many years, where it received the most careful consideration and where all the questions argued herein were examined many times with great attention and with the most earnest desire to carry out the views of the Circuit Court of Appeals and to follow the decisions of the Supreme Court of the United States. To reverse these decisions, to require the purchasers to lose what they have put in, to turn back to the possession of The Put-in-Bay Water Works, Light & Railway Company, the property, which, when the Receiver took it in charge, was incomplete and of little value, but which, as the result of the Court's action has been made valuable, would in its results, it seems to me, be a serious miscarriage of justice. This Court is trying a case in Equity. Justice and Equity require the decree of the Court below to be affirmed.

Respectfully submitted.

J. K. HAMILTON,

Counsel for Appellees, J. William Ryan and Charles W. Ryan, and Barbour & Starr.

No. 332.
Br. of Cochran for Appellee
Office Supreme Court U.S.
FILED
FEB 18 1901
JAMES H. McKENNEY
Clerk

Filed Feb. 18, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 332.

THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY,

Appellant.

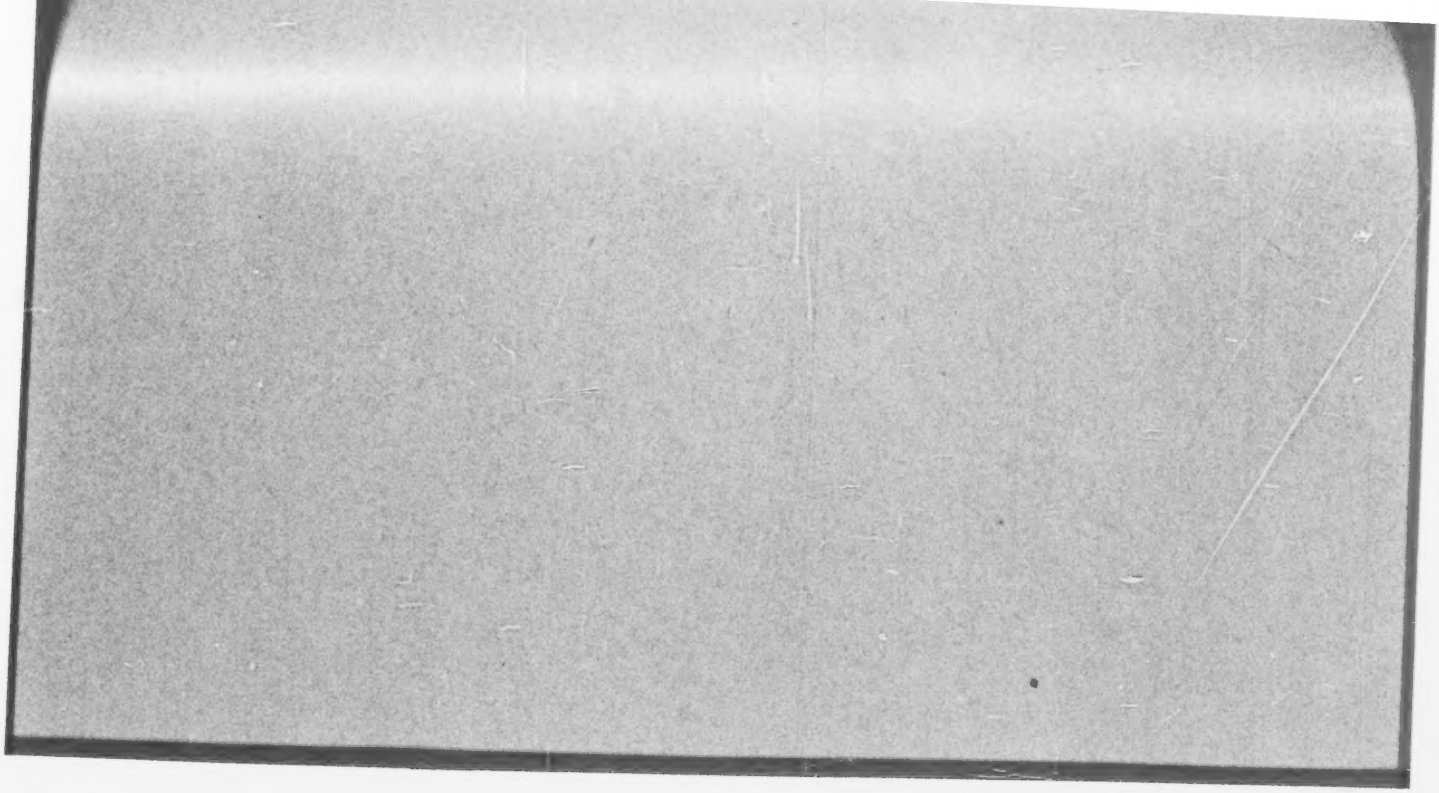
vs.

CHARLES W. RYAN, ET AL., *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR WALKER P. HALL, APPELLEE.

WILLIAM C. COCHRAN,
ATTORNEY FOR WALKER P. HALL,
Owner of Receiver's Certificates.



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STATEMENT OF FACTS.

Before being influenced too much by Appellant's appeal to their sympathies it would be well for the Court to consider some facts relating to (1) the organization and history of the Put-in-Bay Water Works, Light and Railway Co.; (2) the manner in which its railway, power house and other appliances were built and furnished; (3) the manner in which the present holders of a majority of the stock became possessed of it and the amount paid for it; (4) the necessity for the issue of receiver's certificates; and (5) the opportunities appellant had for recovering its property before a sale was ordered to pay the certificates.

I.

The Put-in-Bay Water Works, Light and Railway Co. was never properly organized under the laws of Ohio. Not a dollar of its stock was ever subscribed and paid for in accordance with those laws, and the company, as such, never had a dollar of cash capital. Its authorized capital stock was $150,000, all of which was retained except five shares, which was gratuitously distributed for the purpose of organizing said company. [Record pp. 6, 21, 55, 56.] Mr. Tillotson subscribed for 150 shares, of the par value of $15,000, but never paid for the same; never intended to do so; and was excused by the company from doing so. [Record p. 6.] Thus, without any *bona fide* subscription for its stock, and without any payment on account thereof, this company assumed to do business which, under the statutes of Ohio, it was not authorized to transact until ten per cent. of its stock was subscribed, and ten per cent. of the amount subscribed was paid in. [Rev. Stat. Ohio §§ 3243, 3244.]

Instead of securing capital through stock subscriptions to pay for the construction of its power house, railway, etc., the board of directors authorized an issue of $125,000 first mortage bonds "for the purpose of procuring means to construct said railway," etc. [Record pp. 6, 22, 56.] This, too, was unauthorized by statute which provides that the amount of bonds issued shall not exceed *two-thirds of its capital stock actually subscribed*. [R. S. Ohio § 3286.] They then agreed with Tillotson for the construction of the "electric railway and power house and all other structures and machinery necessary for the completion and operation of" * * * its "railway, water works and electric light works," and "in consideration of the construction and completion of said railway by the said Tillotson," agreed to *turn over* to him, "the capital stock and the bonds of said company as alleged in said answer and cross bill" of Tillotson. [Record pp. 6, 22, 32, 33, 56.] And, as Tillotson avers and the Circuit Court of Appeals finds, Tillotson and the company were one and the same thing; [Record pp. 6, 56.] and continued to be one and the same thing down to July 25, 1892, when John P. Carrothers became the whole thing. [Record, pp, 9, 20, 24, 34, 35.] Neither one of them paid to the company any thing for the stock held by him.

II

Tillotson was elected Vice-President and General Manager of the company and, as such, contracted with all the lienholders for the

lands, labor and material which were procured for and entered into the construction of its railway and plant and operated the same until July 25th, 1892. [Record pp. 2, 16, 18, 19, 22 to 24, 32, 34, 37, 49.]

The company is estopped by its own answer in the case from denying that,

"The said defendant, Tillotson, undertook the construction of said railway solely in the name of said company; that all material bought by him was purchased in the name of said company and was made an obligation against the same. That all contracts and agreements of every kind made by the said defendant, Tillotson, in the construction of said railway were so made in the name of said company and were made a charge and a liability against said company and, in no instance, did the said Tillotson, attempt to purchase material or construct said railway in his own name" * * * "in the *partial construction* of said railway line created obligations not only to the plaintiff herein, but to various other parties, in the name of said company; that *said claims have not been paid and that said parties have taken the necessary steps to complete mechanics' liens against the property of said defendant to secure them for material as aforesaid.*" [Record pp. 23.] See also affidavit of John P. Carrothers, President, [Record p. 36.]

Surely no argument is necessary to show that the equities of the creditors and lienholders are superior to those of the company and the present holders of a majority of its stock, who got it, rightfully or wrongfully, from J. K. Tillotson, subject to all its infirmities in his hands. No lienholders have taken exceptions to the action of the court below.

III.

How did the present holders of the majority stock acquire it, and what did they pay for it, to Tillotson, or any one else?

It seems from Tillotson's cross bill that the defendant, John P. Carrothers, now posing as the President of the Put-in-Bay Water Works, Light and Railway Co., represented that he and his friend H. H. Warner, of New York, a man who has obtained considerable notoriety as a financier, had organized a company known as The Industrial and Mining Guaranty Co., and were prepared to negotiate the sale of stocks and bonds in New York City, and that Tillotson made a contract with them in his own name and in the name of the company by the terms of which they agreed to negotiate and sell $125,000 of the first mortgage bonds of the company, and to pay certain claims and

advance to Tillotson at specified dates certain sums of money aggregating $95,250, and thereupon Tillotson deposited with them $100,000 of the capital stock of the company to become their absolute property when all of the stipulated payments should be made, and the whole issue of $125,000 of its first mortgage bonds, and Tillotson avers that they wholly failed to carry out their contract with him, and have not negotiated or sold any of the said bonds or accounted to him for them, and that the total amount received by him was only $15,000, which he received in sight drafts at the time he made the deposit of stock and bonds; [Record, pp. 7, 8.] that he is still the owner of the $100,000 of stock deposited with the Industrial and Mining Guaranty Co. and that Carrothers, under the claim that he is the owner of said $100,000 of stock elected himself President [Record, p. 9.] He attaches a copy of the contract to his bill marked Exhibit A, which appellant identifies and admits to be correct but has not seen fit to make a part of the record. [Record, pp. 9, 23.]

The allegations of Tillotson are not seriously controverted, but John P. Carrothers and The Put-in-Bay Water Works, Light and Railway Co. set up as an excuse for non-performance of the contract, misrepresentations on the part of Tillotson as to the title and condition of the property, its complete construction, &c., and say that Carrothers became the President of the company by the unanimous vote of the stockholders, July 25, 1892, and immediately took steps to oust the possession of Tillotson, which result was accomplished September 3, 1892. [Record pp. 19, 20, 24, 25, 34, 35, 36.] There is no satisfactory explanation of how Carrothers, individually, became possessed of the $100,000 stock of the company or entitled to vote. If the contract was void on the ground of fraud, and rescinded by them on that ground, it is not perceived how he and his associates could hold the stock and bonds except as security for the repayment of the $15,000 cash advanced.

Irrespective of the merits of the case, as between Tillotson, Carrothers, The Industrial and Mining Guaranty Co. and The Put-in-Bay, &c., Co., it would seem that the equities of the lienholders, who had furnished all the labor and materials for constructing the railway and plant and expended, between them, many times $15,000, were superior to that of any of the parties wrangling for the possession and right to vote the stock of the company, which, as before stated, was never subscribed and paid for.

IV.

Was there any necessity for issuing Receiver's Certificates after the court took possession of the road through its Receiver, September 10th, 1892?

The first application of the Receiver for authority to issue Receiver's Certificates, filed October 15, 1892, sets forth that he took immediate possession of the property and found:

"four electric motor cars standing upon said track without shelter and exposed to the weather; four "trailing cars," to be used in connection with the said motor cars, which are standing upon an old dock in the yards of the Wabash Railway Company in Toledo, Ohio, without cover and exposed to the weather and subject to charges for freight from St. Louis to Toledo, demurrage and cost of unloading," that "it will be necessary for said receiver to store said cars and protect them from the weather during the coming winter, and care for and protect the engines, dynamos, motors and other apparatus and machinery incident to said railway, and to erect a building and employ labor for that purpose."

He states the probable cost of such necessary improvements and the storage and care of the property during the winter, and asks that he may be authorized to issue and dispose of $5,000 Receiver's Certificates at not less than par. [Record, pp. 28-30.]

The second application, filed Dec. 21, 1892, recites that the Receiver has expended the proceeds of the $5000 already authorized:

"in constructing a car house for the protection of the cars of the defendant, The Put-in-Bay W. W., L. & Ry. Co., properly caring for the engine, dynamos and other appurtenances of said defendant, paying freight charges and demurrage, cos. of shipping four cars from Toledo to Put-in-Bay and payment of labor claims under the order of this court" * * * "that there are a large number of labor claims yet unpaid, for which there is no money available in the hands of said Receiver and no money to pay for the care of the property in his hands as Receiver during the coming winter,"

and asks for authority to issue $5,000 more certificates to be sold at not less than par, etc. [Record pp. 43, 44.]

The facts recited in these applications have never been controverted. On the contrary, the answers and cross bills of Tillotson, Carrothers and The Put-in-Bay W. W., L. & Ry. Co., all admit and aver that the road and plant were not complete at the time the property came into the hands of the court. [Record pp. 9, 20, 23, 24,

25, 36.] Carrothers makes an affidavit which was filed Oct. 20, 1892, in which he swears:

"that said road was not completed either in whole or in part, and affiant says that it will take at least twenty thousand dollars to complete the construction of said road." [Record p. 36.]

This would seem to leave open no question as to the necessity for the issue of Receiver's certificates to complete and care for the property.

V.

When the Circuit Court of Appeals for the Sixth Circuit had this case before it on the appeal of the Industrial & Mining Guaranty Co., from the order of the Circuit Court continuing in force an injunction against its disposing of the stock and bonds in dispute, it reversed the Circuit Court and directed that the injunction should be dissolved on the ground that it had been shown that the amount involved was not sufficient to give the Court jurisdiction, that the suit was collusively brought, etc. Recognizing the fact that receiver's certificates had been issued and sold to *bona fide* purchasers, who relied in good faith on the orders of the Court authorizing the same, the Court, while making no orders touching the same, express an opinion as to what should be done by the Circuit Court before dismissing the bill.

"With reference to the receiver's certificates, issued under the order of the Circuit Court, so far as the same have been negotiated and their proceeds applied to the preservation and protection of the property pending this litigation, the discharge of liens thereon and indebtedness owing by the Put-in-Bay Company for labor which has accrued before this suit, all just and reasonable expenditures should be allowed to the receiver as made in the common interest of all concerned in the property. An order should be entered in the cause requiring the receiver to render a full and detailed account of his expenditures, the purposes for which, the persons to whom, and the dates when the same were made and referring it to a master to examine and report upon said accounting."

All of this, with a view to making such order as to costs as shall be just. [Record pp. 66, 67.]

Judge Taft says:

"While I fully concur in the view that the Circuit Court before

dismissing the bill for want of jurisdiction, may require payment of the reasonable expenses incurred in the care and preservation of the property taken within its custody, I do not think we can make any order on this appeal touching the matter." [Record p. 68.]

When the case was remanded, a motion to dismiss for want of jurisdiction was filed on behalf of Appellant, The Industrial and Mining Guaranty Co. and John P. Carrothers. The attorneys appearing for these parties respectively were J. B. Foraker, E. W. Tolerton and Brown & Geddes. [Record p. 69.] Upon the hearing of this motion, the Court ordered a reference to a master to examine the accounts of the receiver "with particular reference to the disposition made by the receiver of the proceeds of the receiver's certificates," etc. [Record pp. 70, 71.]

On March 31, 1894, the master reported. Among other things he says:

"I have been attended by the parties interested in these matters embraced in this reference, to-wit: The Put-in-Bay Water Works, Light and Railway Co., The Industrial & Mining Guaranty Co., and John P. Carrothers, and J. K. Tillotson and their respective counsel, and have taken proofs upon the matter at issue and do report and find as follows, to-wit: * * * *

"The following I find to be a correct statement of the receipts and expenditures of said Receiver, to wit:

RECEIPTS.

From proceeds of receiver's certificates	$8,776.10
One ninety days note	53.46
Earnings of Railway	3,330.30
Other Sources	71.04
	$12,230.90

EXPENDITURES.

Construction	$2,905.05
Power-house	212.45
Track	85.28
Betterments	663.55
Operating Expenses	3,138.98
Insurance	198.95
Care of Property	910.89
Labor Claims	3,326.43
Payment receiver's certificate No. 1 with interest	528.00
	$11,969.58
Cash on hand	261.32
	$12,230.90

"I find that the reasonable compensation to which the Receiver is entitled for his services as such is $2,200—twelve hundred dollars of which sum is for his personal services and one thousand dollars for his attorney fees, paid to Doyle, Scott & Lewis.

"The foregoing findings as to the report of the receiver and his compensation is made after hearing proofs relative thereto, and *by agreement and consent of parties made by counsel at such hearing the same are to be approved and confirmed.*" [Record pp. 71, 72.]

This settles, once for all, the question of the proper application of the proceeds of the receiver's certificates, and all subsequent motions and references with a view to contesting the facts thus admitted were an abuse of the patience of the court and the rights of the parties.

On June 12, 1894, the court entered an order of conditional dismissal of the case, which is endorsed by the attorneys for Carrothers and The Put-in-Bay Water Works, Light and Railway Co., and bears internal evidence that it was consented to by all parties. It provides:

"that upon the payment into court of the amount due on the certificates issued by L. S. Baumgardner, heretofore appointed receiver herein, or the filing herein of said certificates duly paid and cancelled on or before the 30th day of June, 1894, and the payment to the clerk of this court of the costs, in this case, including the compensation of the receiver, which is now taxed at the sum of $1,200, and the compensation of receiver's counsel, which is taxed at the sum of $1,000, said cause be and the same is hereby dismissed.

"And it being made to appear to the court that amounts due J. B. Foraker, Brown & Geddes and E. W. Tolerton," (these are the attorneys for The Put-in-Bay, &c., Co., John P. Carrothers and The Industrial and Mining Guaranty Co.,) "as reported by the master heretofore appointed herein have been fully paid and satisfied, it is ordered that the injunction bond heretofore filed herein be cancelled, and that the parties to said bond be and they are hereby discharged from any liability thereon, and said bond may be withdrawn from the files." [Record, p. 74.]

This was opportunity No. 1 for the company to repossess itself of its property upon the payment of the receiver's certificates and the costs of court, including receiver's compensation and counsel fees, all of which were fixed with the approval of the company's attorney. The company did not avail itself of the opportunity, though it had boasted of its solvency and ability to complete the road and pay and discharge all liens and obligations existing against the property of said company. [Record pp. 20, 24, 25.]

Instead of so doing, the company procures new counsel and,

before a new judge designated to hear the case, proceeds to file and argue motions to dismiss for want of jurisdiction, and to attack the validity of the receiver's certificates, just as if these matters had not been heard and determined. Finally, on June 26, 1896, the company files a petition for the possession of its property in which it represents:

"that it is ready and willing and hereby tenders to the Court a good and sufficient bond for the payment of all charges incurred in said receivership, that may be finally determined a first or prior lien upon the property of your petitioner."]Record, p. 83.]

And prays for an order on the receiver to deliver the property to it.

"Upon the filing by your petitioner of the bond hereinbefore tendered and the approval thereof by the Court." [Record, p. 84.]

And the Court, in its anxiety to hand back to the company its property, chose to overlook all previous findings and orders and the failure of the company to comply with their conditions, and entered another conditional order, in accordance with the prayer of the petition:

"that upon the said respondent, the Put-in-Bay Water Works Light and Railway Company, giving its certain bond to the clerk of this court, for the use and benefit of the parties who may hereafter be found entitled thereto in the sum of twenty thousand dollars and with sureties to be approved by the clerk of this court and having therein the following conditions, to-wit: that the obligors of said bond bind themselves to secure the payment of all charges incurred in the receivership in this action, including his certificates aforesaid, which may finally be determined to be a lieu upon the property of said respondent," etc. * * * "said receiver turn over to said defendant company, all the property of said defendant now in his hands as such receiver, including its railroad." [Record pp. 85, 86.]

This was opportunity No. 2, granted in exact accordance with the terms of the company's own petition, and, again, the company proved itself to be a trifler and incapable of complying with the conditions which it had itself laid down.

In April, 1897, after fair warning to the company, this order was set aside, because the bond, which the company said it was "ready and willing" to furnish, was not filed. [Record p. 87.]

THE QUESTION OF JURISDICTION.

Having disposed of the idea that there was anything like ill will, or oppression in the court's treatment of appellant, we may now consider calmly, the questions of the court's jurisdiction, and the right and duty of the court to order a sale of the property to pay the receiver's certificates.

In the original Bill of Complaint, diversity of citizenship is alleged. The amount in controversy is said to be $2,787.04, as set forth in a detailed statement of account duly attached, the complainant asserts that he has obtained a statutory lien on the property for the whole amount, invokes the aid of a court of equity to enforce his lien and makes other lien holders and persons claiming an interest in the property parties to the suit, and prays that they may be required to appear and set up their respective claims or interest. [Record, pp. 1 to 3.] All of the parties named as defendants did have liens or claimed an interest in the property, and all were properly made defendants.

On the facts set out in this bill, there can be no question of the jurisdiction of the court. And, we take it for granted that, if complainant had a *right* to proceed in the U. S. Circuit Court to enforce his claim, his *motives* for going into that court will not be inquired into.

When and how, if at all, was it made to "appear to the satisfaction of such Circuit Court" * * * * that such suit did not "really and substantially involve a dispute or controversy properly within" its jurisdiction, "or that the parties to said suit had been improperly or collusively made or joined, either as complainants or defendants, for the purpose of *creating* a case cognizable" by it?

The answer of The Put-in-Bay Water Works, Light and Railway Co., filed September 26, 1892, admits the contract of complainant with itself "through its Vice-President, the defendant, J. K. Tillotson," to sell and deliver certain materials to be used in the construction of its railway, but denies that all the supplies and materials named in the account "*were used in the construction of said railway*," and says "that a large part of said materials were sold and delivered to said defendant, J. K. Tillotson, for the purpose of being used and were used in the construction of certain property known as "Hotel Victory;" denies that the goods were of the value of $2,787.04, but admits that complainant obtained a lien for the whole amount, and, by implication, that such lien was a proper one to the extent that such material was used in the construction of its railway, and then adds:

"and such lien was so filed by said complainant at the request of said Tillotson, for said amount, and for the express purpose of instituting this action in this court."

No plea to the jurisdiction of the Court is interposed, but the company prays:

"That this honorable court may take an account of material sold by complainant to and for the use of the defendant *to be used in the construction of said railway*, and the amount of said material so sold, which has actually been used in the construction thereof, and that the court may further determine the value of said material so sold to and used by this defendant, and the actual amount of the lien which said complainant has on account thereof against the property of this defendant." [Record, pp. 16, 17.]

This answer could not affect the jurisdiction any more than any general denial or dispute as to the amount due. The Put-in-Bay etc. Co. was a "light" company as well as a "railway" company, and material might well be sold to it it and used by it for lighting Hotel Victory, all of which would be properly chargeable to it.

In the company's answer to the "cross-bill" of Tillotson, filed the same day, the company asserts that its articles of incorporation

"authorized it to construct and operate an electric railway, water works and lighting apparatus on South Bass Island." [Record p. 21.] And further asserts:

"That *all material bought by him*" (Tillotson) "was purchased in the name of said company and was made an obligation against the same." * * * "That said defendant in the partial construction of said railway line created obligations, *not only to the plaintiff herein*, but to various other parties in the name of said company; that said claims have not been paid and that said parties have taken steps to complete mechanic's liens against the property of said company," etc. [Record p. 23.]

A question of law might be raised as to whether complainant's lien was a valid one as to such property, granting that the material used in the Hotel Victory was so sold and delivered to it, but this was a question which could only be determined on a final hearing on the merits.

The fact that the answer *disputes* the amount claimed does not divest the Court of jurisdiction. It is the *amount in dispute* which gives jurisdiction.

Schunk v. Moline, &c. Co., 147 U. S., 500, 504.

"Whether the defendants could lawfully recover it against the plaintiff in this case was a matter affecting the *merits* and not the jurisdiction."

Dushane v. Benedict, 120 U. S., 630, 636.

Admitting that part of the amout claimed is due, without paying or offering to pay does not deprive the Court of jurisdiction.

Fuller v. Metropolitan L. Ins. Co., 37 Fed., 164.
See also
Butcher's &c. Co. v. Louisville &c. Co., 67 Fed., 39, 40.
Kunkel v. Brown, 99 Fed., 593, 595.
Pine v. Mayor, &c., 103 Fed., 337, 338.

The matter stood thus until Oct. 29, 1892, (the rule days for answers and replications not having arrived) when the Industrial & Mining Guaranty Co., filed a motion to dissolve the temporary injunction against disposing of the bonds and stock in its possession, and The Put-in-Bay Co. filed a motion to discharge the receiver. The grounds for both motions were: (1.) That no notice of the application for the injunction, or appointment, was given to the defendants. (2.) That the averments of Tillotson's answer and cross-bill were untrue. [Record pp. 31, 32.]

There is not a suggestion of want of jurisdiction of the case and affidavits or counter affidavits on such a question could not be expected and would not be relevant.

The affidavit of Mr. Carrothers in support of the motions, filed the same day, goes over the controversy between Tillotson, The Put-in-Bay, etc. Co. and The Industrial etc. Co., at great length, but there is no allusion in it to the court's want of jurisdiction or to any facts which would tend to impeach it. [Record, pp. 32 to 38.]

He alludes to "a restraining order" obtained in the State court to prevent Tillotson from interfering with the company's possession and control of its railway and attaches a copy of the order. [Record, pp. 37 to 39.]

The order is *conditioned* upon the company's giving an undertaking in the sum of $5,000 and it is nowhere asserted that such bond was given. The clerk who verifies the copy of the order and to whose satisfaction the bond was to be given, is signifiantly silent, as to whether or not any bond was given. [Record, p. 39.] The absence of this important item of evidence and the course of the company with

regard to the bond it tendered and was "ready and willing" to give in this case—but never did—lead to the presumption that no bond was given in the Common Pleas Court. That, however, is a matter which could not in any way affect the jurisdiction of the Circuit Court in a suit brought to marshal and enforce liens brought against all parties having an interest in the property.

The discussion of the hearing of suits commenced in the Common Pleas Court of Ottawa County, Ohio, in Mr. Hamilton's brief is so full and elaborate that we would add but a single remark. In neither of these suits was there an attempt to marshal and enforce liens against the property, and in neither of them did the Court itself take *possession* or control of the property. There was absolutely nothing to prevent any lienholder's going into the U. S. Circuit Court to enforce his lien, and to draw into that suit all parties having conflicting claims. Suits brought against Tillotson to prevent his factious and illegal interference with the possession and operation of the railway, and to recover motor cranks and pins carried off by him, [Record p. 35;] could not bar *him* from asserting any claim he had against the company or any lien upon its property.

The authorities cited by Appellant's Counsel, [Brief pp. 35 to 37,] are not in point.

On Nov. 12, 1892, an affidavit of F. S. Terry was filed in which he states that he is the manager and attorney in fact of the complainant company, located and doing business in Chicago; that this company had a claim against The Put-in-Bay Co. for $2,787.04 and on Sept. 6, 1892 was advised by L. G. Richardson, a Toledo attorney, to file a lien against The Put-in-Bay Co. for the amount of its claim and authorize him to bring suit against the company; that the material actually used in the construction of the railway amounted to $861.23; that the balance amounting to $1,925.81 was used inside of Hotel Victory;

"*That all of said material was ordered by the said defendant, J. K. Tillotson, as vice-president of said defendant corporation; that it was shipped to the said defendant corporation and was charged upon the books of the plaintiff corporation to the said Put-in-Bay Water Works, Light and Railway Co.* [Record, p. 41.]

The exhibits attached show that there was another claim against the Hotel Co., which was not included in the above. [Record p. 42.] They also show that complainant was solicitious about his claim and did not bring the suit merely to accommodate Mr. Tillotson or, in the language of Terry's affidavit, "for the purpose of

enabling the defendant, J. K. Tillotson, to file therein his cross-petition for the purpose of having a receiver appointed.

There can be no question that under the statute, before a Court is required to dismiss a cause for want of jurisdiction, it must "*appear*" and "*appear to the satisfaction of such Circuit Court*," that it has no jurisdiction.

The mere filing of an affidavit in support of a motion in the case, which is *not a motion to dismiss for want of jurisdiction*, can hardly be said to call the attention of the Court, much less to *satisfy* it that it had no jurisdiction. An issue should be raised in some way, by plea to the jurisdiction, or motion to dismiss, and proofs taken with respect to such issue, before the Court can be expected to act and satisfy itself on the question of jurisdiction. Judge Taft recognized this when he said in his opinion:

"It may be that the jurisdictional question involved should be regularly raised upon the record by plea or otherwise." [Record p. 67.]

And counsel for appellant recognized the necessity for it, by filing such a motion Dec. 5, 1893. This was the first step taken, so far as the record shows, to call the attention of the Circuit Court to its want of jurisdiction, and this was nearly a year after the last of the receiver's certificates had been issued and sold, and the proceeds applied to the construction of a car house, the payment of labor claims, and the care of the property.

In Barry v. Edmunds, 116 U. S:, 550, 559, the court says:

" It might happen that the judge, in the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But, upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a *legal certainty* of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said Circuit Court.' "

and reversed the action of the court below in dismissing a case for want of jurisdiction.

In Hartog v. Memory, 116 U. S., 588, 590, Waite, C. J., says:

"Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction, that the court can dismiss the case upon the motion of either party."

These cases are cited with approval in the recent case of Wetmore v. Rymer, 169 U. S., 115, 122, and this court restates as law [p. 128:]

"that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a *legal certainty* of that conclusion,"

and reversed the decision of the court below; dismissing the case for want of jurisdiction.

It is clear under these cases that the benefit of the doubt must be in favor of the jurisdiction, and when the judge is not persuaded, even in his own mind, that there is want of jurisdiction, he has no business to dismiss a case because a *suspicion* has been raised by an *ex parte* affidavit.

The court might well be excused for not feeling *satisfied* that its jurisdiction was improperly invoked, even if its attention had been directed to that question. The affidavit of Terry might well fail to *satisfy* the court for several reasons. (1) It was *ex parte* with no opportunity to cross examine. (2) Any volunteer statement of a party that he had perjured himself when he filed his lien and afterwards when he filed his bill of complaint, would justly be viewed with suspicion. (3) The confession that "the petition was verified by the representative of this plaintiff corporation." [Record, p. 41.] was false. The "representative" mentioned was one who was advised by its attorney and therefore could not have been the attorney himself. No such representative verified the petition. [Record, p. 3.]. (4) The false swearing is said to have been done in the first instance, because "they were unaware that the said defendant corporation had been reorganized on the 25th day of July, 1892 and that the said J. K. Tillotson, had been voted out of office by the directors. [Record, pp. 40, 41.] This would seem to be a good ground for swearing falsely in the *second* instance, rather than the *first*, and currying favor with

"the powers that be." (5) The facts stated:

"*That all of said material was ordered by the said defendant, J. K. Tillotson, as vice president of said defendant corporation; that it was shipped to the said defendant corporation, and was charged upon the books of the plaintiff corporation to the said Put-in-Bay Water Works, Light and Railway Company.*" [Record, p. 41.]

the letter of the complainant to Richardson, attached to the affidavit:

"Did you file the lien and is our account secured? We note the appointment of a receiver for the hotel and presume that *our little account there* is lost. We hope, however, that the account against the railway company is not at all hazardous." [Record p. 42.]

And Richardson's reply:

"I filed your lien against the Put-in Bay Water Works, Light and Railway Co. for record," etc. * * * "I think your claim is perfectly safe and will keep you posted as anything turns up." * * * "I wish you would *mail me a copy of your account against the Hotel Co.*, that I may prepare the necessary affidavit and file with the recorder." [Record p. 42.]

are consistent with the allegations of the Bill of Complaint and the *bona fides* of the proceeding and inconsistent with the other statements in the affidavit that the claim was false and the suit brought merely to enable the defendant, J. K. Tillotson, to file therein his cross-petition for the purpose of having a receiver appointed.

It is perfectly clear that complainant had an account against the Hotel, which was not included in the account or lien against The Put-in-Bay Co.

The whole affidavit is of such a character as disgusts a right-minded man and the Court would naturally attach no importance whatever to its statements. It does not require contradictory affidavits to rebut so plain a fabrication to suit the needs of Mr. Carrothers in his controversy with Tillotson.

If complainant had a valid claim against The Put-in-Bay Water Works, Light & Railway Co., for $2,787.04, about which there can be no dispute, even on Terry's affidavit, it had a right to bring an action at law in the U. S. Circuit Court. If it had procured a lien on the property for that amount, which appears from this affidavit, as well as the Bill of Complaint, to be true—it had the right to come into the U.

S. Circuit Court, as a court of equity, to enforce its lien and ask for the sale of the property, marshaling of liens and payment of its claim in its proper order, and, when it did so come, *the court had jurisdiction to hear and determine.*

The Circuit Court of Appeals thought differently, probably because counsel for the various lienholders were indifferent as to whether the suit was dismissed or not, (the Receiver and the holder of the Receiver's certificates were not represented), and did not argue the question of jurisdiction and analyze this wonderful affidavit.

All of these proceedings after that were had in strict conformity with the opinion of the Circuit Court of Appeals for the Sixth Circuit and were so regarded by that Court, when a writ of mandamus was asked for in that Court.

In re The Put-in-Bay Water Works, Light and Railway Co., 90 Fed., 831.

If the intention of this appeal is to review the decision of that Court, on the question of jurisdiction and dismissal, we submit that it cannot be done in this way.

Aspen Mining, &c. Co. v. Billings, 150 U. S., 31, 37.

If the original opinion and action of the Circuit Court, prior to and unaffected by the decision of the Circuit Court of Appeals, is the subject of inquiry, we submit that the Circuit Court was right in declining to dismiss the case for want of jurisdiction upon the filing of Terry's affidavit, no such issue having been presented by plea or motion to dismiss, and the affidavit being subject to the suspicion and criticism we have mentioned.

NECESSITY FOR A SALE TO PAY THE RECEIVER'S CERTIFICATES.

But, assuming for the sake of argument, that the court should have refused to proceed further, and should have dismissed the suit, the judge was required by the statute to "*make such order as to costs as shall be just.*"

Before the motions to dissolve the injunction and to discharge the receiver were filed, before these *ex parte* affidavits were filed, the court had, on evidence that was deemed sufficient, authorized the receiver to issue and dispose of $5000 certificates.

"the proceeds to be used in the proper care and preservation of the property in his hands as receiver;"

and the order made them :

"a lien upon the property of said railway company in the hands of said receiver, superior and prior to all other liens, excepting only costs and expenses of this action." [Record, p. 30.]

and they were purchased for full value by innocent purchasers, relying on the order of the court.

The $5000 realized from the sale of the first certificates proving insufficient for the purpose authorized and the payment of labor claims ordered by the court, the receiver applied for authority to negotiate and sell $5000 more and received it December 22, 1892. [Record, pp. 43, 45.]

Under this additional authority certificates to the amount of $3,776.10 were issued and one certificate of the first issue, amounting to $500, was paid, leaving outstanding $8,276.10. [Record. p. 72.]

The necessity for their issue and the proper application of the proceeds have already been discussed [ante p. 5.] There is nothing in the record that would enable this court to review those questions, even if appellant had asked it to do so. It must be conclusively presumed that there was a necessity for their issue and that the proceeds were properly applied in the care and preservation of the property and discharge of preferred claims against it.

The validity of Mr. Hall's purchase and holding of these certificates was attacked by Arbuckle, Ryan & Co. [Record, p. 75.] and after a full hearing on the pleadings and evidence, and argument by counsel, the court found :

"That the said Walker P. Hall purchased said receiver's certificates for full value and in good faith relying upon the orders of this court and is the present holder thereof, that the same have not been paid, nor has anything been paid to the said Walker P. Hall on account thereof and that they are still a first lien upon all of the property and franchises of the defendant company, The Put-in-Bay Water Works, Light and Railway Company, and that said cross-petitioners are not entitled to have said cause dismissed until said receiver's certificates and expenses and the costs of this cause are paid in full." [Record p. 76.]

This finding also cannot be reviewed in this Court, because the evidence on which it was based is not made a part of the record.

We are then brought face to face with the remarkable proposition that a Court of Equity having, at a time when its jurisdiction was apparent on the face of the papers, taken into possession a railway, and power, lighting and water works plant; authorized the issue of receiver's certificates for the completion of the plant, its proper care and preservation and for the payment of labor-claims incurred by the company in the construction and operation of its railway, every dollar realized from which was properly applied and accounted for; and having declared by decretal order that such certificates were a first lien upon all the property of said railway company in the hands of its receiver, in order to induce persons to purchase the certificates, should dismiss the suit and order the receiver to return the property to the railway company without making any provision to reimburse the receiver for his outlay or the holder of the certificates for his money, which had been taken and expended in completing and caring for the property and discharging preferred claims against it.

Such an order would be a travesty on justice, and Courts of Equity would be justly held in contempt if it were possible to make it. The argument proceeds on the theory that the court is in no better position than a highwayman, or trespasser *in delicto*, and that its orders are entitled to no more respect than those of a common criminal.

When did *coram judice* cease to mean anything? When and where has the doctrine been established that a person relies on the orders of a court at his peril?

Will this court, now, for the first time in history, announce such a doctrine?

The argument also ignores the fact that the court assumed jurisdiction of the case and took possession of the property when, on the face of the papers it had not only a right, but a duty to do so. The burden of proving that jurisdiction was improperly assumed was upon defendant, and it was not discharged by filing answers in the case, or filing affidavits to which the attention of the court was not called until December 22, 1892. The mischief had already been done, and the rights of innocent persons, whose money had been used to benefit defendant's property were involved. Five thousand dollars had been expended and $3,276.10 more was absolutely needed to protect the property, for the benefit of all concerned. The court could not hesitate, even if it felt satisfied, then, that its jurisdiction had been improperly invoked. It was not merely a question between parties to the suit, whose rights would remain the same if the suit was dismissed without prejudice. It was a question of the rights of a party who

became interested in the course of the court's exercise of *de facto* jurisdiction, relying upon the orders of the court, made *coram judice*.

The court must, as a matter of equity—as a matter of self respect—protect the holder of the receiver's certificates issued and sold under such circumstances. It must require that the money taken and expended for the common benefit of the company and the lienholders be repaid.

We fully agree with counsel for appellant that the Court should, upon being satisfied that its jurisdiction had been improperly invoked, try to restore things to their former state, and put all parties back in their former positions so far as practicable. [Record p. 44.] Their argument, however, fails to satisfy the sense of justice, when it is limited to putting *appellant* back in its former position, and takes no account of Mr. Hall's former position. Nowhere in appellant's brief is there a suggestion as to how Mr. Hall is to be reimbursed for the money taken from his pockets for the completion and proper care and preservation of the property and the payment of preferred claims.

The Court first ordered that the property should be restored on payment of the Receiver's Certificates and the costs, the amount of which was agreed upon [Ante, p. 8]. It next ordered that the property should be restored to the company on the filing of a bond conditioned on the payment of such amount as should be found to have been properly expended on the company's property [Ante p. 9]. Neither of these orders were complied with, although the second one was entered in response to appellant's petition for such an order.

The reason is plain. The other liens on the property exceeded the amount for which it could be sold and the company could only enjoy its possession, until proper proceedings could be begun in the State Court for foreclosure and sale and the appointment of a receiver. The company had no capital, having given away all its capital stock, and its credit, if it had any, would naturally be at a low ebb in the face of the recorded liens and the prospects of further litigation.

The Court, while awaiting the company's action in the matter, did the best possible thing in leasing the road to the highest bidder, from season to season, and applying the rentals to the continued care and preservation of the property and the payment of interest on the certificates.

Finally, in April, 1897, its patience was exhausted and it became apparent that the company either could not, or would not do anything, until all the mechanics' liens on the property expired by limitation and a new question was forced upon it. Had it the right to

jeopardize the rights of all the lienholders by holding the property, indefinitely, in the hope that the company, which had neglected every opportunity to repossess itself of its property, would some day pay the certificates and take it out of the hands of the Court?

The answer to this seemed plain. Duty seemed to require the immediate sale of the property to pay the receiver's certificates.

Counsel for appellant seem to contend that even if it be considered proper to sell the property to pay the receiver's certificates, it was improper to consider the claims of lienholders or make any orders touching said claims.

They ignore a patent fact in the case, that no sale could be effected, if the property was offered for sale subject to a lot of undetermined liens. The purchaser at such a sale would not get a clear title, but would be immediately subjected to a suit, or perhaps a multitude of suits, to enforce liens against the property which had not been divested by the sale. The fact, even if admitted, that they were inferior liens would not make any difference. The proceedings to hear and determine the rights of the lienholders were ancillary to and rendered necessary by the proceedings to sell the property in its custody to pay the just charges upon it.

The opinion of Judge Severens in this case [Record pp. 93 to 96] is fully sustained by the authorities.

Conwell v. Valley Canal Co., 4 Biss., 195, 200, 212.
Minnesota Co. v. St. Paul Co., 2 Wall., 633.
Gumbel v. Pitkin, 124 U. S., 131.
Compton v. Jessup, 43 Fed., 485, 486; S. C., 68 Fed., 263, 278.
Carey v. Houston Ry. Co., 52 Fed., 671, 675, 676.

The attack on the validity of the receiver's certificates, based on Hanna v. State Trust Co., 70 Fed., 2, and Thompson v. Thompson, 16 Wisc., 94, needs but a word, even if the question is one properly before this Court.

In the first case the authority to issue certificates to improve lands held by a private land company and to make them prior to a mortgage lien on the premises was denied—but authority to issue certificates to improve and preserve the property of a railway company, a common carrier, a quasi public corporation was admitted.

In the second case it is admitted that persons, who improve property in good faith, believing that their title is good may recover the value of their improvements even though an adverse claim is success-

fully asserted. The rights of occupying claimants are everywhere recognized.

We find no case, among all those cited by appellant, in which the authority of a Court, having possession of property like that of The Put-in-Bay Co., to issue receiver's certificates in order to care for and preserve it while it remains in its custody is denied. Mercantile Trust Co. v. Kanawha &c. Ry. Co., 58 Fed., 15, cited by counsel for appellant, [Brief p. 47], is good enough for us.

With all their industry they have failed to find a case which sustains their position, that a Court is bound to ignore the certificates issued while its jurisdiction was apparent and allow the company to receive back its property, improved, preserved, relieved from taxes and labor liens, without making any provision for repaying the holder of the certificates whose money is thus applied for the company's benefit.

CONCLUSIONS.

In conclusion we submit the following propositions applicable to the case, which we believe to be based on the authorities and natural equity, viz:

1. Before a Circuit Court of the United States can dismiss a case for want of jurisdiction it must be satisfied by evidence, directed to some pertinent issued raised on the record, which creates a *legal certainty* that the case did not involve a real controversy within the cognizance of the court.

2. Such legal certainty cannot be said to be produced by a single *ex parte* affidavit of one of the parties, in which he contradicts former affidavits appearing in the records made by himself, contradicts *facts* appearing of record and makes statements and furnishes documents tending to corroborate his former affidavits and to discredit his later affidavit; especially when such affidavit is filed to support motions in which the question of jurisdiction is not raised.

3. When a Court is satisfied by evidence, produced two months after the commencement of a suit, that its jurisdiction has been improperly invoked, it must make such order as to costs as shall be just and may require that receiver's certificates, which have been issued and sold under its orders to complete and properly care for a railway, taken into its possession while in the exercise of apparent jurisdiction over the parties and subject matter, shall be repaid by the owner of the railway as a condition of its restoration, the proceeds of said cer-

tificates having been properly applied to the improvement and preservation of the property, and the discharge of preferred liens upon it.

4. When such owner persistently neglects and refuses for a period of four years, to either pay said certificates or to give bond for the payment of the same and when there is no fund in court from which to pay the same and the party responsible for the suit and the appointment of the receiver becomes insolvent or irresponsible, the court may order the property sold to pay said certificates.

5. As a necessary incident to such a sale, parties having liens upon the property, or claiming an adverse interest in the same, may be allowed to present their respective claims for adjudication and consent to the sale of the property free from their respective liens.

6. The details of such sale and findings and orders with respect to the validity of the certificates, proper application of the proceeds, etc., cannot be reviewed in this court.

7. The order of a Circuit court with respect to costs will not be reviewed or set aside unless there has been a plain abuse of the discretion given to such court by statute.

8. The equities of lienholders and the holders of receiver's certificates, with whose money a railway has been constructed, equipped and properly cared for, are superior to those of the ostensible owner, a corporation which was never properly organized, never had any capital, and never succeeded in borrowing more than $15,000 with which to pay for its construction.

Respectfully submitted,

WILLIAM C. COCHRAN,

ATTORNEY FOR WALKER P. HALL,

Owner of Receiver's Certificates.

Supreme Court of the United States.

No. 332.—October Term, 1900.

The Put-in-Bay Waterworks, Light and Railway Company, Appellant,
vs.
Charles W. Ryan and William J. Ryan, Partners as Arbuckle, Ryan and Company, et al.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

[May 13, 1901.]

In September, 1892, the Electric Supply Company, a corporation and citizen of the State of Connecticut, filed in the Circuit Court of the United States for the Northern District of Ohio a bill of complaint against the Put-in-Bay Waterworks, Light and Railway Company, a corporation and citizen of the State of Ohio. It was alleged in the bill that the plaintiff company had, in June, 1872, sold and delivered to the defendant company certain materials and supplies to be used in the erection of the lighting apparatus, powerhouse, station and railway of the defendant, of the value of $2,787.04, and that said supplies and material were used in the construction of the lighting apparatus and railway of said defendant, situated in Put-in-Bay Island, in Ottawa County, Ohio, and that the entire amount of said claim was due and unpaid.

The bill further alleged that, on September 7, 1892, the plaintiff company had filed with the recorder of Ottawa County an affidavit containing an itemized statement of the amount and value of the materials and supplies furnished under said contract of sale, with a statement of the account and terms of payment to be made thereunder and a description of the premises upon which said lighting apparatus and railway were located, which said statement and all connected therewith were duly recorded by said recorder in a book kept for that purpose; that the plaintiff has a lien on the premises and all the property of defendant company from the 7th day of June, 1892, for the amount due with interest; and that, in the premises, the plaintiff was entirely without remedy according to the strict rules of the common law, and could only have relief in a court of equity where matters of such a nature were properly cognizable and reviewable.

The bill further alleged that the Railway Equipment Company, a corporation and citizen of the State of Illinois; John Arbuckle, Charles Ryan and W. J. Ryan, citizens of the State of Ohio; James K. Tillotson, a citizen of the State of Ohio; the Cleveland Electrical Manufacturing Company, a corporation and citizen of the State of Ohio; the Industrial

and Mining Guaranty Company, a corporation and citizen of the State of New York; John P. Carrothers, a citizen of the State of New York; and H. H. Warner, a citizen of the State of New York, claimed to have some interest in the premises upon which the plaintiff claimed to the aforesaid lien; and the bill prayed that each of said parties should be required to appear and set up their respective claims, or be forever barred from setting up the same against the plaintiff. The bill prayed for an account with the defendant company, and for a decree of sale of said premises, &c.

On September 10, 1892, an answer and cross bill were filed by J. K. Tillotson. In this cross bill it was alleged that said Tillotson had built and equipped the railroad of the defendant company, and had received in payment therefor the stock of said company and mortgaged bonds to the amount of $125,000; that he had contracted with John P. Carrothers and H. H. Warner, as owners and controllers of the Industrial and Mining Guaranty Company of New York, (named as defendants in the bill of complaint,) to sell and dispose of said stock and bonds, but that said Carrothers and Warner had not sold or accounted for the said stock or bonds, but that said Carrothers, claiming to be the owner of the capital stock of said defendant company, had elected himself president thereof, and had taken possession of said railroad, &c. It was thereupon prayed, in said cross bill, that a restraining order should be issued against said Carrothers and Warner and the said Industrial and Mining Guaranty Company, forbidding them, during the pendency of this suit, from selling or disposing of said stock and bonds, and that the court should appoint a receiver to take charge and custody of the railway and property in plaintiff's bill of complaint described, with instructions to care for and operate the same under the order of the court, and as, in the judgment of the court, might be for the interest of all parties concerned.

Thereupon, on September 10, 1892, a subpœna was issued summoning said Carrothers, Warner and the Industrial and Mining Guaranty Company to appear and answer said cross bill. On the same day a temporary restraining order was issued against said Carrothers and Warner as prayed for in the cross bill, and one L. S. Baumgardner was appointed receiver, who gave a bond as such receiver in form and amount approved by the United States District Judge.

The United States marshal made return that he had served the restraining order and subpœna on said John P. Carrothers, and that said H. H. Warner and the Industrial and Mining Guaranty Company were not found.

Subsequently, on September 26, 1892, the Put-in-Bay Waterworks, Light and Railway Company filed an answer to the bill of complaint, admitting that on June 7, 1892, the defendant had entered into a contract with the complainant company, whereby the latter company was to sell and deliver certain materials to be used in the construction of defendant's railway in Ottawa County, Ohio. The said answer contained the following allegations:

"This defendant says that it is not true that Exhibit 'A' attached to complainant's bill contains a true and correct statement of the material so sold by the complainant to this defendant as aforesaid. And it is not true that all of said supplies and materials contained in said Exhibit 'A' were used in the construction of the said railway. But, on the contrary, this defendant says that a large part of said materials were sold and delivered to said J. K. Tillotson, defendant, for the purpose of being used, and which were used, in the construction of certain property known as Hotel Victory on South Bass Island. This defendant says that it is not true that the material sold to this defendant by said complainant as aforesaid were of the value of $2,787.04, as set forth in said Exhibit 'A,' but on the contrary this defendant is informed and believes, and so states the fact to be, that the materials so sold by said complainant to this defendant, through its vice president, the defendant Tillotson, for the purpose of being used in the construction of said railway, and which were so used, amounted in value to about the sum of $700, and no more. . . . This defendant further says that the said complainant, when it sold the said Tillotson the material set forth in Exhibit 'A' of said complaint, well knew that a large part of said material was so sold and delivered for the purpose of being used, and were used, in the construction of Hotel Victory, of which the said Tillotson was president, and which had no connection whatever with this defendant's railroad. And this defendant alleges that said complainant, at the request of said Tillotson, procured a lien to be filed with the recorder of Ottawa County against this defendant's property, on the day previous to the filing of the complainant's complaint herein, and for the entire amount of the material sold this defendant and also sold to said Tillotson for the use of said Hotel Victory. And said lien was so filed by said complainant at the request of said Tillotson, for said amount, and for the express purpose of instituting this action in this court.

"And this defendant prays that this honorable court may take an account of material sold by complainant to and for the use of the defendant, to be used in the construction of said railway, and the amount of said material so sold, which has been actually used in the construction thereof. And that the court may determine the value of said material so sold to and used by this defendant, and the actual amount of the lien which said complainant has on account thereof against the property of this defendant."

On September 26, 1892, the Put-in-Bay Waterworks, Light and Railway Company filed an answer to the cross bill of Tillotson, admitting some and denying many of the allegations thereof, and containing the following allegation:

"This answering defendant further says that on or about the 3d day of September, 1892, the said defendant Tillotson, attempting to interfere with the said company in the operation of its said railway, and to prevent the said company from the peaceable enjoyment of its said property, the common pleas court of Ottawa County, Ohio, on the petition of said Put-in-Bay Waterworks, Light and Railway Company, issued a restraining order enjoining the said defendant James K. Tillotson from interfering or attempting to interfere in any manner with the said company in the operation of its railway, and which said restraining order is still in full force and effect."

It also appears that the defendant company sued out of the court of common pleas a writ of replevin against Tillotson, but it is not shown what the property levied on was.

Afterwards, on September 30, 1892, the answer and cross bill of Arbuckle, Ryan & Company, who had been named as defendants in said suit, was filed, in which it was, among other things, alleged that said firm had furnished a large amount of machinery and of labor for the said Put-in-Bay Waterworks, Light and Railway Company, which went into the construction of said railroad and powerhouse of said company, on which there was unpaid and due to the said Arbuckle, Ryan & Company a balance of $11,153.60, and for which they had filed, on August 17, 1892, with the recorder of Ottawa County, Ohio, an affidavit and itemized account, by virtue of which proceeding they had obtained a lien upon the property and railroad of the defendant, the said railroad company. They therefore prayed for an account, and for an order directing the sale of the said property and railroad, and for the payment of their claim out of the proceeds of such sale.

On October 15, 1892, L. S. Baumgardner, theretofore appointed receiver, filed a petition showing cause why certain expenditures incident to the care and preservation of the railroad and its property since they had come into his hands, and other expenditures necessary to be made, required him to raise a sum of not less than $5,000, and prayed for leave to issue receiver's certificates for that purpose. This was followed by an order of the court authorizing the receiver to issue certificates to the amount of $5,000, and declaring said certificates to be a first lien upon all the property of said railway company in the hands of said receiver.

Afterwards, on October 29, 1892, a motion to discharge the receiver was made on behalf of the defendant railway company, which was accompanied by an affidavit of J. P. Carrothers, as president of said company, in which, among other things, it was stated that on September 3, 1892, the affiant, as president of said company, was compelled to and did institute replevin proceedings to obtain possession of the personal property of said company, and that by virtue of said action the property of said company was turned over to affiant as president thereof, excepting the books, papers, muniments of title and certain other of the personal property belonging to said company which were taken away and secreted by said Tillotson; and that said railway company obtained from the court of common pleas of Ottawa County a restraining order enjoining Tillotson from interfering with the company's peaceable enjoyment of the possession and control of said Put-in-Bay Waterworks, Light and Railway Company, its property and business, such order to take effect upon the plaintiff giving an undertaking, as provided by law, in the sum of $5,000, to the satisfaction of the clerk of said court.

Afterwards, on November 12, 1892, an affidavit of one F. S. Terry, as manager and attorney of complainant company, was filed in the present case, in which, among other things, it was stated that the Electric Supply Company was induced to include all sums due for material furnished for use of the Hotel Victory Company in its account against said railroad; that the amount actually used in the construction of the Put-in-Bay Waterworks, Light and Railway Company amounted to $861.23; that the balance of said material, to the amount of $1,925.81, was used inside of said Hotel Victory; that all of said material was ordered by said defendant Tillotson, as vice president of said defendant corporation, and was charged upon the books of the plaintiff corporation to the said Put-in-Bay Waterworks, Light and Railway Company.

On December 22, 1892, the court overruled the motion to dismiss the receiver and to modify the order to said receiver to issue certificates; and an order was made, on the further petition of the receiver, allowing him to issue additional certificates to the amount of $5,000.

On January 20, 1893, an appeal from the decree of the Circuit Court overruling the motion to discharge the injunction and to modify the order authorizing the receiver to issue certificates, and retaining jurisdiction, was taken by the Industrial and Mining Guaranty Company, a corporation of New Jersey, and one of the defendants in the cause, to the Circuit Court of Appeals for the Sixth Circuit; and, on June 22, 1893, that court reversed the decree of the Circuit Court, the injunction was dissolved and the cause was remanded to the Circuit Court with directions for further proceedings in conformity with the opinion of the Circuit Court of Appeals. (58 Fed. Rep. 732, 746.)

On December 14, 1893, the Circuit Court, in pursuance of the mandate from the Circuit Court of Appeals, dissolved the injunction theretofore granted on the cross bill of Tillotson, and, on December 28, 1893, appointed Irvin Belford a special master commissioner for the purpose of examining the accounts of the receiver, with particular reference to the disposition made by him of the proceeds of the certificates, and also to report the expenses found by the master to have accrued to the defendants, or any of them, and the reasonable compensation to which the receiver was entitled, &c.

On March 31, 1894, Irvin Belford, the special master, filed his report in the Circuit Court, in which he found that the receipts of the receiver from all sources amounted to the sum of $12,230.90, whereof $8,776.10 were from proceeds of receiver's certificates, and his expenditures amounted to the sum of $11,969.58, leaving a balance of cash on hand of $261.32. The master further found that the reasonable compensation to which the receiver was entitled was $2,200; of which $1,200 were for his personal services, and $1,000 for his attorney's fees. He also found that the expenses

and costs incurred by the defendant, the Industrial and Mining Guaranty Company, consisting principally of attorney's fees, amounted to the sum of $8,795.25.

Subsequently, on June 12, 1894, the Circuit Court made the following order:

"This day this cause came on for further hearing upon the motion of the Industrial and Mining Guaranty Company, the Put-in-Bay Waterworks, Light and Railway Company and John P. Carrothers, to dismiss this cause for want of jurisdiction. And the court, having heard the evidence and the arguments of counsel, and being now fully advised in the premises, does grant said motion conditionally.

"It is therefore ordered, adjudged and decreed that, upon the payment into court of the amount due on the certificates issued by L. S. Baumgardner, heretofore appointed receiver herein, or the filing herein of said certificates, duly paid and cancelled on or before the 30th day of June, 1894, and the payment to the clerk of this court of the costs in this case, including the compensation of the receiver, which is now taxed at the sum of $1,200.00, and the compensation of receiver's counsel, which is now taxed at the sum of $1,000, said cause be, and the same is, hereby dismissed."

On December 5, 1894, Arbuckle, Ryan & Company moved the court to dismiss the cause in compliance with the order previously made that said cause be dismissed when the receiver's certificates were paid, because, as alleged, that said certificates have been paid in full, but that Walker P. Hall and James E. Hutton, the holders of said certificates, have failed and refused to bring the same into court to have them cancelled, &c.

On March 1, 1895, the following order was entered:

"This cause came on to be heard on the motion of Arbuckle, Ryan & Company to compel the holders of the receiver's certificates heretofore issued under the orders of this court herein to deliver them up to be cancelled and to dismiss said cause; the order to Walker P. Hall and James E. Hutton to show cause why said receiver's certificates should not be cancelled; the answer of Walker P. Hall to said citation to show cause, and the evidence was argued by counsel; and the court, being fully advised in the premises, finds that the said Walker P. Hall purchased said certificates for full value and in good faith, relying upon the orders of this court and is the present owner and holder thereof; that the same have not been paid, nor has anything been paid to the said Walker P. Hall on account thereof, and that they are still a first lien upon all of the property and franchises of the defendant company, the Put-in-Bay Waterworks, Light and Railway Company, and that said cross petitioners are not entitled to have said cause dismissed until said receiver's certificates and expenses and the costs of this cause are paid in full."

On October 5, 1895, a motion was made by the Put-in-Bay Waterworks, Light and Railway Company to dismiss said action and to direct the receiver theretofore appointed to forthwith deliver the property of the company in his possession and under his control, &c.

On May 6, 1896, Judge H. F. Severens entered an order fixing May 14 for the hearing of said motion, and further ordering that any other party or parties who might be interested in the action of the court to be taken upon said motion should have leave to intervene and be heard at said hearing.

On June 4, 1896, Judge Severens entered an order containing, among other things, the following:

"I am further of the opinion that the motion heretofore made upon the petition of the Put-in-Bay Waterworks, Light and Railway Company, directing the receiver to surrender the property in his hands and dismissing the suit, should be denied, my opinion being that there are certain charges incurred in the receivership, the extent of which is not now determined, which must be ascertained and satisfied before the property can be released and the case dismissed, even if the case be dismissed and the property surrendered, this order, however, to be without prejudice to a renewal of a like application and motion when the situation of the case shall be ripe for a dismissal."

On June 25, 1896, the defendant company filed another petition, renewing its motion that the receiver should be directed to surrender to the company the property in his possession, which petition contained, after certain recitals, the following paragraphs:

"Your petitioner further represents that it is ready and willing and hereby tenders to the court in good and sufficient bond for the payment of all charges incurred in said receivership that may be finally determined a first and prior lien upon the property of your petitioner.

"Wherefore your petitioner prays that an order may be entered in this cause directing the receiver to forthwith deliver to your petitioner all of the property of your petitioner of every kind and description now in his custody or under his control by virtue of his appointment as receiver aforesaid, upon the filing by your petitioner of the bond hereinbefore tendered and the approval thereof by the court. . . . Your petitioner further prays that a reference be had for the purpose of ascertaining the amount of the charges incurred by the receiver herein with particular reference as to the disposition made by the receiver of the proceeds of the receiver's certificates heretofore issued in this action, the purposes for which, the persons to whom and the dates the same were made; that said reference shall include the ascertainment of any other changes made in said receivership and the purposes for which the same were created."

Whereupon, on July 15, 1896, Judge Severens entered an order granting the railway's petition for restoration of property upon giving a bond of $20,000, to be approved by the clerk of the court, for the use and benefit of the parties who might hereafter be entitled thereto, and providing that the obligors of said bond should bind themselves to secure the payment of all charges incurred in the receivership in this action, including his certificates aforesaid, which might finally be determined to be a lien upon the property of said railway company, and should, in giving this bond, submit them-

selves to the jurisdiction of the court to the end that the court might make such bond effectual for the collection of said charges by order or decree in this cause, &c.

On April 17, 1897, the following order was entered:

"It appearing under the decree ordered herein on July 15, 1896, providing for a restoration of the property in the hands of the receiver, L. S. Baumgardner, heretofore appointed in this cause, to the defendant, the Put-in-Bay Waterworks, Light and Railway Company, upon the said company filing a bond as provided in said decree, and further under the decree of January 6, 1897, extending the time for the filing of said bond to March 1, 1897, that said defendant, the Put in Bay Waterworks, Light and Railway Company, has not filed said bond: Now, therefore, it is hereby ordered and decreed that the said decree of July 15, 1896, be and it is hereby set aside and held for naught."

Several further motions were made not necessary now to mention, and finally on January 31, 1898, the court filed an opinion finding that there was not a sufficient available fund in the hands of the receiver with which to satisfy the receiver's certificates and other necessary charges, and that it was necessary to sell the railroad and other real estate and fixtures belonging to the works of the Put-in-Bay Waterworks, Light and Railway Company, in order to raise a fund necessary to completely satisfy the charges, and accordingly directed notice to be given to the several intervening parties.

Pending these proceedings, the Atlantic Trust Company, a corporation and citizen of the State of New York, on March 7, 1898, asked and obtained leave to file an intervening petition or complaint against the defendant railway company, wherein it was alleged that said intervening company was the holder as trusteee of certain bonds of said railway company aggregating $125,000, secured by a deed of trust or mortgage, bearing date June 16, 1892, on all the property, railroad and franchises of said railway company; that said bonds were in default and unpaid; and thereupon prayed that said mortgage be declared a lien on said property and be foreclosed.

On November 21, 1898, the Put-in-Bay Waterworks, Light and Railway Company filed a demurrer to the intervening petition of the Atlantic Trust Company, which demurrer was on January 31, 1899, overruled.

On December 12, 1899, the Circuit Court, Hon. Horace H. Lurton, Circuit Judge, and Hon. Henry F. Severens, present, entered an order containing, among other things, the following:

"It appearing to the court that there has been filed in this cause no plea or answer to the intervening petition of the defendant Atlantic Trust Company, or to its amendment thereto, and that each and every of the defendants and the complainant are in default thereof: Now, therefore, on this 12th day of December, 1899, came the said Atlantic Trust Company, by its solicitors, H. Van Campen, Jr., and Swayne, Hayes and

Tyler, and on its motion, it is ordered that the said intervening petition and amendment thereto be taken *pro confesso* as to all parties to this action—reserving, however, to the defendant, the Bodefield Belting Company, without further pleading herein, the right to present for the further consideration of the court and its orders thereon all or any question as to the priority of the lien claimed by said the Bodefield Belting Company over the said lien of said Atlantic Trust Company."

And thereupon, on the same day, Irvin Belford was appointed as special master to ascertain and report the number and ownership of bonds secured by said mortgage, and the amount of principal and interest due thereon.

On December 15, 1899, the Circuit Court, present Hon. Horace H. Lurton, Circuit Judge, and Hon. Henry F. Severens, District Judge, entered the following decree or order of sale:

"It being made to appear to the court that there is now past due and unpaid on the receiver's certificates heretofore issued under the order and direction of the court in this case the sum of $7,996.10, which amount represents the balance due on all of said certificates now outstanding up to this date and shall bear interest hereafter at seven per cent., all of which certificates have been deposited with the clerk of this court, and which amount and the costs of this case taxed and taxable against the defendant the Put-in-Bay Waterworks, Light and Railway Company, to wit, the sum of $——, the court finds are the first and best lien on all the property of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company, and there being no income or moneys available in the hands of the receiver sufficient to provide for the payment of said certificates and costs, it is accordingly ordered, adjudged and decreed that unless said defendant or some party in interest pay or cause to be paid to the clerk of this court the amounts so as aforesaid found due for receiver's certificates and the costs, as aforesaid, together with the sum of $15,033.44, being the amount due as found by this court in a prior order in this case on the amended intervening petition of Arbuckle, Ryan & Company, with interest computed to the date of this decree, and the sum of $784.85 being the amount found due in a prior order of this court on the intervening petition of Barbour & Starr, with interest computed to the date of this decree, and the sum of $486.88, being the amount found due in a prior order of this court on the intervening petition of the Bodefield Belting Company, with interest computed to the date of this decree, within thirty days from the date of this decree, all of the property of the defendant, the Put-in-Bay Waterworks, Light and Railway Company, hereinafter more specifically described, and all of the right, title, and interest and equity of redemption of said defendant, the Put-in-Bay Waterworks, Light and Railway Company, and each and every party to this action in and to the said property and in and to all property which has since the date of the filing of the petition herein been acquired by said the Put-in-Bay Waterworks, Light and Railway Company or by the receiver appointed by this court or which may hereafter be acquired prior to the sale hereinafter provided for, shall be offered for sale and sold by and under the direction of Mathias A. Smalley, who is hereby appointed special master for the purpose, in the manner hereinafter directed, to satisfy the amounts

due, as aforesaid, for said receiver's certificates, and costs, and also to satisfy the amounts found due as aforesaid, on the amended intervening petition of Arbuckle, Ryan & Company and the intervening petitions of Barbour & Starr and the Bodefield Belting Company, and that the property ordered to be sold under this decree shall be sold in accordance with the course and practice of this court at public sale to the highest bidder for cash, at the courthouse of Ottawa County, Ohio, at Port Clinton, in said county, being the county in which said property is situate, and that notice of the time and place of such sale shall be given by said Mathias A. Smalley, special master, as aforesaid, by advertisement thereof published once a week for at least four weeks prior to said sale in at least one newspaper printed, regularly issued, and having a general circulation in said Ottawa County, which said notice shall describe the property to be sold.

"It is further ordered, adjudged, and decreed that the said special master in making such sale shall first offer for sale all the right, title, and interest of the defendant the Put-in-Bay Waterworks, Light and Railway Company in and to the railroad, so called, of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company, including therein the line of railway cars, motors, apparatus, tracks, side tracks, switches, turnouts, poles, wires, and other apparatus, together with the franchises, easement, and rights of way connected therewith or appurtenent thereto, not part of, however, or belonging to the powerhouse property, so called, hereinafter described, provided that no bids for said above-described property, when thus offered separately, shall be received for less than a sum equal to the amounts found due, as aforesaid, upon receiver's certificates and the costs hereinbefore provided; and provided further, however, and it is hereby ordered, that if within thirty days from the date of this decree the said defendant, the Put-in-Bay Waterworks, Light and Railway Company, or any party in interest herein, pay or cause to be paid to the clerk of this court the amount so, as aforesaid, found due on said receiver's certificates, together with the costs of this action, as hereinbefore adjudged, then said marshal shall not expose or offer for sale under this decree the railroad property as above described. In case said railroad property, so called and above described, shall be separately offered for sale under the above terms of this decree and the amount bid therefor shall equal the amount of said receiver's certificates and costs aforesaid, then said special master shall sell the aforesaid property to the highest and best bidder therefor, and thereupon shall next offer for sale and sell to the highest and best bidder for cash all the right, title, and interest of the defendant the Put-in-Bay Waterworks, Light and Railway Company in and to the remainder of the property of the said the Put-in-Bay Waterworks, Light and Railway Company, to wit, the powerhouse property, so called, being lots numbers four hundred and seventy-one (471), four hundred and seventy-two (472), four hundred and seventy-three (473), four hundred and seventy-four (474), and four hundred and seventy-five (475) of Victory Park addition, in Put-in-Bay or South Bass Island, Ottawa County and State of Ohio, together with all the buildings and appurtenances thereon, including the plant, machinery, apparatus, and fixtures attached to or contained in said buildings or either of them, provided that no bid for said powerhouse property as above described shall be received for less than $10,000.

"It is further ordered that if in accordance with the terms of this decree, as hereinabove set forth, separate offer of the aforesaid railroad company, so called and as hereinabove described, shall be made, and the sum bid therefor shall not, however, be equal to the amount found due, as aforesaid, upon said receiver's certificates and the costs aforesaid, then separate sale thereof shall not be made, but in lieu of said offer of the remainder of the property of said defendant, the Put-in-Bay Waterworks, Light and Railway Company, as provided by the terms of this decree hereinabove set forth, said special master shall forthwith offer for sale and sell for cash to the highest and best bidder therefor all the property of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company above described, including both the railroad property, so called, and the powerhouse property so called, as hereinabove described, as a unit, but no bid therefore as a unit shall be received for less than $16,500.

"It is further ordered, adjudged, and decreed that the said special master return the proceeds of said or any of said sales into the registry of this court, to be there held subject to the further order of this court.

"It is further ordered and directed that the said special master make report of his acts and doings under this decree with all convenient speed after said sale or sales shall have taken place.

"The court hereby reserves for further consideration as between Atlantic Trust Company and the Bodefield Belting Company any and all questions arising between them as to the priority of their respective liens, and the court further expressly reserved for its further consideration all matters not herein expressly provided for."

On March 2, 1900, the report of M. A. Sma.. pecial master in chancery, was filed, showing that on February 24, 1900, he had sold to J. W. and C. W. Ryan, at public auction, for the sum of $16,501, all the property of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company; and on March 8, 1900, the court approved the said report and sale *nisi;* and on March 26, 1900, no exceptions or objections to the sale having been filed by any of said parties, it was ordered that the said order confirming said sale was made absolute, and the special master directed to immediately execute a deed for the property so sold by him to the purchasers.

On June 8, 1900, an order or decree of distribution was made, containing, among other things, the following:

"This day came Arbuckle, Ryan & Company, the Bodefield Belting Company, Barbour & Starr, the Put-in-Bay Waterworks, Light and Railway Company, Walker P. Hall, L. S. Baumgardner, receiver, and Atlantic Trust Company, by their respective counsel, and thereupon this cause was heard upon the motion of Walker P. Hall for an order releasing the bond by him heretofore given conditioned for the repayment of any moneys by him received from the receiver herein should he be ultimately found not entitled thereto.

"In consideration whereof the court, being duly advised in the premises, doth find that the condition of said bond has been fully satisfied, and that the same should be cancelled and discharged, but retained in the custody of the court.

"It is therefore ordered and adjudged by the court that said bond be, and the same hereby is, cancelled and discharged, and the said Walker P. Hall and his surety are hereby released from any and all liability thereon.

"And thereupon this cause was further heard upon the motion of the said Walker P. Hall for an order of the court directing the clerk to pay the said Walker P. Hall out of the moneys in the registry of the court and arising from the sale of the property of said defendant, the Put-in-Bay Waterworks, Light and Railway Company, the sum of $2,400, claimed to have been paid by him on the 28th day of July, 1894, to said L. S. Baumgardner, as receiver, in liquidation of the allowances theretofore made said receiver and his counsel, together with certain expenditures by said receiver made, and was argued by counsel.

"In consideration whereof the court, being duly advised in the premises doth find that said motion is not well taken and should be denied.

"It is therefore ordered and adjudged by the court that said motion be, and the same hereby is, overruled at the costs of said Walker P. Hall.

"Thereupon this cause was further heard upon the fifth and final report of said receiver, L. S. Baumgardner, heretofore appointed herein, and was submitted to the court.

"In consideration whereof and upon examination thereof the court finds the same to be, in all respects, true and correct, and it is therefore ordered and adjudged by the court that the same be, and it is hereby, approved and confirmed.

"And the court doth further find that all the property of the said defendant, the Put-in-Bay Waterworks, Light and Railway Company, has been sold and delivered to the purchaser thereof, and that there is no further need for a receiver herein.

"The court does further find that said receiver and his counsel, Doyle & Lewis, have performed valuable services in the care and preservation of the property of said defendant since the last allowance made them herein. It is therefore ordered and adjudged by the court that out of the funds in his hands said receiver be allowed, and he is hereby authorized to pay unto himself, in full of his compensation for such services, the sum of $200; to Doyle & Lewis, his said counsel, the sum of $300, in full payment for the services rendered him as such receiver, and to the clerk of this court the balance remaining in his hands, to wit, the sum of $269.18, to be applied by said clerk in part payment of the costs herein incurred.

"It is further ordered and adjudged by the court that upon making said payment of said sum to said clerk, and upon filing with the clerk of this court proper receipts, evidencing the disbursements by him made, as set forth in his said final account, said receiver shall stand discharged from all further duties and obligations as such receiver, and that the condition of said bond by him heretofore filed herein as such receiver be satisfied and said receiver and his surety be relieved from all liability thereon.

"And thereupon this cause was further heard upon the petition of Arbuckle, Ryan & Company, one of the intervenors herein, for an order of the court distributing the proceeds arising from the sales of the property of the Put-in-Bay Waterworks, Light and Railway Company, heretofore made in accordance with the former order of this court, and was argued by counsel.

"In consideration whereof the court, being duly advised in the premises, doth find that the prayer of said petition should be granted.

"It is therefore ordered and adjudged by the court that the clerk of this court be, and he hereby is, ordered and directed to forthwith distribute the moneys in the registry of the court and arising from said sales aforesaid in the following manner, to wit:

"I. To the clerk of this court the costs of this suit and remaining unpaid, including the sum of $175 to the special master commissioner hereby allowed as his compensation for his services by him rendered in selling said property, and the further sum of $54.30, hereby allowed him for the expenses and expenditures by him incurred in connection therewith, which said amounts shall be paid said master commissioner.

"II. To the owner or owners of receiver's certificates, heretofore issued herein, upon the surrender and cancellation thereof, the amount heretofore found to be due thereon, to wit, $7,966.10, together with interest thereon, at the rate of 7% per annum, from the 13th day of December, 1899, to the date when this order shall finally take effect.

"III. To the county treasurer of the county of Ottawa and State of Ohio the sum of $591.66, being the taxes and assessments levied and assessed against the property of said the Put-in-Bay Waterworks, Light and Railway Company for the year 1899.

"IV. 100/165 part of the balance remaining to Arbuckle, Ryan & Company, the Bodefield Belting Company and Barbour & Starr, pro rata, in proportion to the amounts heretofore found due them respectively.

"The balance, after the payments aforesaid, to wit, the sum of $——, shall be retained in the registry of the court to await its further and final order.

"And thereupon this cause was further heard, upon the motion of the Atlantic Trust Company, trustee, for leave to withdraw its petition filed herein for allowance of compensation; which leave is given, and the same is accordingly done, without prejudice, however, to the rights of said trustee to hereafter file its petition therefor.

"To all the foregoing order and decree the said the Put-in-Bay Waterworks, Light and Railway Company, by its counsel, excepts on the ground that the court is without jurisdiction in the premises, for the reason that it appears by the record herein that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, and the parties to said suit were improperly and collusively joined for the purpose of creating a case cognizable by said Circuit Court under the act of Congress of March 3, 1875, as to which question of jurisdiction an appeal has been taken by the said the Put-in-Bay Waterworks, Light and Railway Company to the Supreme Court of the United States, at Washington."

On June 2, 1900, an appeal was allowed in the following terms:

"The former appeal prayed by the above-named appellant, the Put-in-Bay Waterworks, Light and Railway Company, and allowed by me on the 23d day of February, 1900, having been discontinued, and the said appellant having now presented a new petition praying for the allowance of an appeal from the decrees of this court made on the 12th, 13th and 15th days of December, 1899, said petition is now granted and the appeal is allowed.

"And thereupon, on the request of Walter L. Granger, of counsel for the appellant, I do hereby certify to the Supreme Court of the United

States that upon the hearing of the said cause, wherein the said decrees so appealed from were entered, as well as upon various interlocutory hearings during the progress of the cause, the said appellant denied the jurisdiction of the court over said cause and contended that the court was without jurisdiction upon the grounds that the amount in controversy was in truth and in fact much less than the sum of two thousand dollars ($2,000), exclusive of interest and costs, and that the case had been fraudulently and collusively instituted by the parties thereto for the purpose of creating the appearance of jurisdiction not in fact existing; which contention, so far as related to the receiver's certificates and the intervening petitions, was overruled.

"And it is accordingly certified that the appeal herein allowed is granted for the single purpose of presenting to the said Supreme Court the question whether the Circuit Court had jurisdiction to entertain the said cause and render the decrees so appealed from.

"The clerk is therefore directed to certify to the United States Supreme Court, at Washiugton, the portions of the record in said cause appertaining to said jurisdictional question upon the appellant executing a bond for costs in the sum of five hundred dollars ($500).

H. F. SEVERENS, *Circuit Judge.*"

Mr. Justice SHIRAS delivered the opinion of the Court.

The contention in the brief on behalf of the appellant, that "by the service of the writ of replevin issued from the State court the property came into the custody and possession of that court for all purposes of jurisdiction in that case, and no other court had a right to interfere with that possession except a court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises, the State court having placed the property in the possession of the officers of the railway company as against the claim of Tillotson, by a writ of replevin, the United States Circuit Court in this case had no jurisdiction to issue an injunction or to appoint a receiver, by means of which the company and its officers were prevented from using and operating the railway property, which the State court had directed its officers to place in their hands," seems to answer itself.

By the operation of the writ of the State court certain personal property of the Put-in-Bay Waterworks, Light and Railway Company was taken from the possession of one Tillotson and restored to that of the company, and by a restraining order Tillotson was prohibited from interfering with the use and operation by the company of its railway property. Whatever, then, may have been the nature or merits of the questions between the railway company and Tillotson, it is conceded that the actual possession of the property, whether real or personal, was in the railway company at the time when, in the suit of the Electrical Supply Company, the receiver was appointed by the Circuit Court of the United States. It is too plain for argument that the replevin suit, affecting only certain articles of personal

property, and arising out of a controversy between the railway company and Tillotson, its vice president, could not draw into the jurisdiction and control of the State court the railroad and franchises of the railway company, so as to preclude creditors of the company from instituting proceedings in the Federal court. As respects the restraining order, if such were even issued, it does not appear that Tillotson ever disobeyed it, and, if he did, he personally would be answerable to the State court. It may be further observed that it is not made to appear that the restraining order ever became operative as an injunction by the filing of a bond in $5,000, which was imposed as a condition for its issuance. At all events, and conclusively as to the merits of this contention, the property and franchises which are the subject matter of the present suit were not, either actually or constructively, in the possession of the State court when the Federal court appointed its receiver.

Our inspection of this record has not constrained us to hold that the Circuit Court lost its apparent jurisdiction of the case by reason of disclosures made subsequently in the progress of the case. The mere denial that the materials sold by the complainant to the railway company were of the value alleged in the bill did not, of itself, deprive the court of jurisdiction. Thereby was presented a question of fact into which the court had jurisdiction to inquire. Within the letter of the statute there was a controversy between citizens of different States, in which the matter in dispute was over the sum or value of two thousand dollars.

The fifth section of the act of March 3, 1875, (18 Stat. 470,) provided that if "any suit commenced in a Circuit Court, . . . it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, the said Circuit Court shall proceed no further therein, but shall dismiss the suit."

And it has been several times decided by this court that a suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts, when made to appear on the record, create a legal certainty of that conclusion. (*Barry* v. *Edwards*, 116 U. S. 550; *Wetmore* v. *Rymer*, 169 U. S. 115.)

It is not clearly shown in this record that, at any time after the suit was brought, it was made to appear, *to the satisfaction of the Circuit Court*, that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court. On the contrary, it appears that the Circuit Court was not so satisfied, but overruled complainant's motion to dissolve the preliminary injunction and to discharge the receiver. Thereupon the cause was taken on appeal to the Circuit Court of Appeals, and that court directed that the preliminary injunction

granted by the Circuit Court should be dissolved, but held that, on that appeal, the Circuit Court of Appeals had no jurisdiction to proceed further, and was without power to direct a dismissal of the bill or to vacate the order appointing a receiver.

It is true that observations were made by the judges of that court, based on affidavits made in the court below, that jurisdiction had been collusively obtained by reason of false statements of the amount of materials sold by the complainant to the defendant company, and they seem to have thought that by such affidavits the Circuit Court had been made to know that its equitable jurisdiction had been improperly invoked. (*Industrial &c. Co.* v. *Electrical Supply Co.*, 58 Fed. Rep. 733, 744.)

But such observations of the learned judges did not have the force of a decision, nor did they undertake to direct the Circuit Court to dismiss the bill for want of jurisdiction.

It further appears that, upon the filing of the mandate of the Court of Appeals in the Circuit Court, the counsel of complainant filed a motion to dismiss the bill, and claimed that the Court of Appeals had decided that the Circuit Court had no jurisdiction. This and subsequent motions to the same effect were overruled by the Circuit Court, and the Circit Court of Appeals denied an application for a writ of mandamus. (90 Fed. Rep. 831.)

Pending these proceedings and before the final decree of sale, the Atlantic Trust Company filed an intervening petition, alleging its ownership as trustee of one hundred and twenty-five mortgage bonds of the defendant company; that there was the sum of $40,250 due and unpaid on account of said indebtedness, and praying for an account and for a decree of foreclosure and that the lien of said trust company should be decreed to be a lien prior to those of the other creditors. As already stated, the Circuit Court overruled the defendant's demurrer to this intervening petition, and on December 12, 1899, the court entered an order that said intervening petition should be taken *pro confesso*, and appointing a master to ascertain and report the amount and ownership of the outstanding mortgage bonds. And subsequently, on December 15, 1899, the final decree or order of sale was entered, in which the court reserved for further consideration, as between the Atlantic Trust Company and the Bodefield Belting Company, any and all questions arising between them as to the priority of their respective liens. A sale of all the property of the defendant railway company, in pursuance of said decree, was made on February 24, 1900; and, no objections or exceptions to the sale having been filed by any of the parties, on March 26, 1900, the sale was confirmed absolutely, and the master directed to execute a deed for the property so sold by him to the purchasers.

It appears that, under the intervening petitions of other creditors than the complainant, there were involved, before and at the time of the decree of sale, liens and claims against the defendant's property largely in excess of the amount necessary to confer plenary jurisdiction on the Circuit Court. Jurisdiction having attached under the allegations of the original bill, and the court having proceeded, in a proper exercise of its discretionary power, to appoint a receiver and to authorize a large expenditure of money raised by certificates, in order to protect and preserve the property in its custody, and the court having also, in the exercise of its power as a court of equity, allowed the intervention of other creditors, as between some of whom and the defendant company there was jurisdiction in the court, both as respects diversity of citizenship and amount of claims, we think its jurisdiction did not fail by reason of anything that appeared in *ex parte* affidavits filed on behalf of the defendant company, denying the truth of the allegations contained in the original bill in respect to the amount in dispute.

In *Krippendorf* v. *Hyde*, (110 U. S. 283,) it was said: "The equitable powers of courts of law over their own process, to prevent abuses, oppression and injustice, are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in custody of the law. (*Buck* v. *Colbath*, 3 Wall. 334; *Hagan* v. *Lucas*, 10 Pet. 400.) And when, in the exercise of that power, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several States, the very circumstance appears which gives the party a right to an equitable remedy, because he is deprived of a plain and adequate remedy at law; and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by treating the intervention of the stranger to the action in his own interest as what Mr. Justice Story calls, in *Clarke* v. *Matthewson*, (12 Pet. 172,) a dependent bill."

Circuit Judge Severens, in his opinion in the present case, aptly referred to the case of *Gumbel* v. *Pitkin*, (124 U. S. 132,) as containing an elaborate exposition of the principles upon which a court of equity may proceed when the rights of intervening creditors are to be dealt with, and upon which principles the Circuit Court proceeded in this case.

We fail to perceive any equities in the position of the appellant company. All its creditors, as well the original complainant as the several intervening creditors, have acquiesced in the action of the Circuit Court and have availed themselves of the remedy afforded by the sale of the defendant's property. Having failed and declined to accept the opportunity afforded

by an interlocutory order to regain possession of its property, by giving a bond to pay such charges as the court should determine to be just and proper, and not having offered, at last, to pay the claims and liens adjudged to be just and proper, the defendant company seems to us to have suffered no injustice. However this may be, the case is before us only on the question whether the Circuit Court had jurisdiction to entertain the said cause and render the decrees so appealed from, and this we answer in the affirmative, and direct the appeal to be dismissed with costs.

Let it be so certified.

True copy.

Test:

Clerk Supreme Court, U. S.